



HAWAII

PUBLIC PROCUREMENT CODE

DESK REFERENCE

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PREFACE

In 1994, the Hawaii Legislature enacted the Hawaii Public Procurement Code. The new Procurement Code represented a sweeping reform of public procurement law in Hawaii and was patterned after the *American Bar Association's Model Procurement Code for State and Local Governments*.

Since the enactment of the Code, a growing volume of reported decisions actually applying the Code has been issued by both the Office of Administrative Hearings and the Hawaii Supreme Court. Those decisions afford the occasion for this reference. It is hoped that this reference will facilitate a better understanding of the requirements of the Code.

The issues that have been addressed by the Office of Administrative Hearings and the Hawaii Supreme Court have generally fallen into five categories: Jurisdiction and Standing, Bid Mistakes, Bid Responsiveness, Bidder Responsibility, and Remedies. In addition, several recent decisions have considered the application and scope of the Code's requirement that all action on the solicitation or the award of a contract be stayed pending the resolution of a protest. These categories have been incorporated into the organization of this reference in order to facilitate the practitioner's use of these materials.

Finally, in enacting the Code, the Legislature expressed a strong desire to establish a comprehensive code that would provide for fair and equitable treatment of all persons dealing with the procurement system, foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process, and increase confidence in the integrity of the system. The decisions reported in this reference consistently attempt to interpret the Code in accordance with these objectives and, undoubtedly, these objectives will continue to be a driving force behind all future decisions interpreting the Code.

I. INTENT OF THE CODE

A. Legislative intent of Code and implementing rules: In enacting Hawaii Revised Statutes (“HRS”) Chapter 103D, the Hawaii Public Procurement Code (“Code”), the Legislature sought to establish a comprehensive code that would: (1) provide for fair and equitable treatment of all persons dealing with the procurement system; (2) foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process; and (3) increase confidence in the integrity of the system. *Standing Committee Report No. S8-93, 1993, Senate Journal at 39; HAR §3-120-1.*

Cases:

Purpose of Code; fair treatment; competition; integrity; In enacting HRS Chapter 103D, the Legislature sought to establish a comprehensive code that would: (1) provide for fair and equitable treatment of all persons dealing with the procurement system; (2) foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process; and (3) increase confidence in the integrity of the system. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999); Wheelabrator Clean Water Systems, Inc. v. City & County of Honolulu, PCH 94-1 (November 4, 1994); Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998).*

Purpose of Code; flexibility; common sense; The intent of the Code, as expressed in the Senate Committee’s Report S8-93, Spec. Sess., Senate Journal at page 39 (1993), states that “This bill lays the foundation and sets the standards for the way government purchases will be made, but allows for flexibility and the use of common sense by purchasing officials to implement the law in a manner that will be economical and efficient and will benefit the people of the State.” *The Systemcenter, Inc. v. State Dept. of Transportation, PCH 98-9 (December 10, 1998).*

Purpose of Code; foster public confidence; A savings of \$21,000 of public funds would do more to foster public confidence in the integrity of the procurement system than would a strict adherence to a largely technical requirement. The requirement of Hawaii Administrative Rules (“HAR”) §3-122-108(a) was not meant to cost public bodies thousands of dollars by requiring acceptance of higher bids for mere technical violations. *Standard Electric, Inc., vs. City & County of Honolulu, et. al, PCH 97-7 (January 2, 1998).*

Purpose of Code; promote competition; prevent favoritism, corruption; Genuine competition can only result where parties are bidding against each other for precisely the same thing and on precisely the same footing. The object of bidding statutes is to prevent favoritism, corruption, extravagance and improvidence in the awarding of public contracts. To permit a substantial change in a proposal *after* bids have been opened and made public, would be contrary to public policy, and would tend to open the door to fraudulent and corrupt practices. *Wheelabrator Clean Water Systems, Inc. vs. City & County of Honolulu, PCH 94-1 (November 4, 1994).*

Public bidding statutes construed to public good; requires rigid adherence; Public bidding statutes must be construed with sole reference to the public good and must be rigidly adhered to in order to guard against favoritism, improvidence, extravagance, and corruption. *Clinical Laboratories of Hawaii v. City & County of Honolulu, PCH 2000-8 (October 17, 2000).*

Code construed in manner consistent with its purpose; In construing the various provisions of the Code, the foremost obligation is to ascertain and give effect to the intention of the Legislature which is to be construed primarily from the language of the statute itself. The language must be read in the context of the entire statute and construed in a manner that is consistent with its purpose. *Hawaii Newspaper Agency, et. al v. State Dept. of Accounting & General Services, PCH 99-2; Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, PCH 99-3 (April 16, 1999)(Consolidated).*

II. APPLICATION OF CODE

A. General Application: The Code applies to all procurement contracts made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance. “Procurement” means buying, purchasing, renting, leasing, or otherwise acquiring any good, service, or construction. The term also includes all functions that pertain to the obtaining of any good, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. *HRS §§103D-102; 103D-104; HAR §3-120-3.*

Cases:

Code inapplicable to concession contract; A petition for an administrative hearing to contest the award of a concession contract which was solicited/awarded by an agency pursuant to the provisions of HRS Chapter 102 (Concessions on Public Property), does not fall within the jurisdictional authority of DCCA Hearings Officers as set out in HRS Chapter 103D. The term “concession” (as defined in HRS §102-1), focuses on an agency’s granting of a privilege to conduct certain operations, while the term, “procurement” (as defined in HRS §103D-104), focuses on the agency’s acquiring goods, services or construction. *Elite Transportation Co., Inc. v. State Dept. of Transportation, PCH 96-2 (May 21, 1997).*

Code applicable to contracts involving expenditure of public funds; The Code was originally applicable to and continues to be applicable to procurement contracts made by governmental bodies that involved the expenditure of public funds as consideration irrespective of whether those funds consist of cash, revenues, realizations, receipts, or earnings. *Waikiki Windriders/Hawaiian Ocean’s Waikiki, PCH 2002-9 (July 26, 2002).*

No expenditure of funds; Code inapplicable; A plain reading of the bid documents leads the Hearings Officer to conclude that the consideration for the contract involved in this solicitation is the payment to the City of a premium by the high bidder in exchange for the exclusive right to provide towing services. Indeed, the contract does not contemplate the expenditure of public funds by Respondent as consideration for the “buying, purchasing, renting, leasing, or ...acquiring [of] any good, service, or construction.” Accordingly, the solicitation is not subject to HRS Chapter 103D. *Stoneridge Recoveries, LLC v. City and County of Honolulu; PCH-2003-5 (June 26, 2003).*

B. Exemptions; The Code shall not apply to contracts by governmental bodies of the types set forth in HRS §103D-102(b) and HAR §3-120-4.

Cases:

Review of exemption determination precluded; HRS §103D-102(b) precludes administrative review of chief procurement officer’s determination that contract was exempt from requirements of Code. Therefore, Hearings Officer correctly concluded that he did not have jurisdiction to review chief procurement officer’s determination that interim contract was exempt from requirements of the Code. *Carl. Corp. v. State, 93 Haw. 155 (2000).*

III. COMPETITIVE SEALED BIDDING

A. Generally: Award is based upon the criteria set forth in the invitation for bids. The invitation for bids must include a purchase description and all contractual terms and conditions applicable to the procurement. *HRS §103D-302*.

Cases:

Ambiguity in the solicitation construed against drafter; An ambiguity in the language of a solicitation is properly interpreted against the party drafting that document. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998)*.

Bidder's reliance on document outside of the invitation is erroneous; Any purported reliance on an outdated HDOT handout, which did not waive the pre-certification requirement that qualifying DBE subcontractors must have been certified as such prior to the bid opening date, which had been subsequently revised, and which was not even part of the invitation for bids, was misplaced and erroneous. *Fletcher Pacific Construction Company, Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998)*.

B. Construction contracts; requirement to list subcontractors; If the invitation for bids is for construction, the invitation shall specify that all bids include the name of each person/firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each. Construction bids that do not comply with this requirement may be accepted if the chief procurement officer concludes that:

(1) acceptance is in the *best interest of the State*; and

(2) the value of the work to be performed by the joint contractor or subcontractor is *equal to or less than one per cent of the total bid amount*.

HRS §103D-302(b); HAR §3-122-21(a)(8).

Cases:

Purpose of listing requirement; anti-bid shopping; One of the primary purposes of the listing requirement is to prevent bid shopping and bid peddling. The listing requirement was based in part on the recognition that a low bidder who is allowed to replace a subcontractor after bid opening would generally have greater leverage in its bargaining with other potential subcontractors. By forcing the contractor to commit, when it submits its bid, to utilize a specified subcontractor, the Code seeks to guard against bid shopping and bid peddling. *Hawaiian Dredging Construction Company v. City & County of Honolulu, PCH 99-6 (August 9, 1999); Okada Trucking Co., Ltd. v. Board of Water Supply, et. al, 97 Hawaii 544 (App. 2001)*.

Purpose of the listing requirement; legislative intent; HRS §103D-302(b) was subsequently amended by Act 186, 1994 Haw. Sess. L. Act 186, §9 at 422, to, among other things, limit the discretion of the chief procurement officer to waive a bidder's failure to comply with the subcontractor listing requirement. Thus, the intent of the legislature was to add a one percent or less threshold to qualify for a waiver of a violation of the subcontractor's listing requirement. *Okada Trucking Co., v. Board of Water Supply, et. al, 97 Hawaii 544 (App. 2001)*.

Listing requirement; scope; Construed literally, HRS §103D-302(b) does not mandate that a public works construction contractor use specialty subcontractors in performing portions of the construction work. The only requirement is that a contractor list those subcontractors who are “to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and nature and scope of the work to be performed by each.” Therefore, if a contractor does not plan to use a subcontractor in the performance of the contract, and the contractor is not required by statute, rule, or the IFB to use a joint contractor or subcontractor to perform portions of the contract, the contract is not required to list any joint subcontractor. *Okada Trucking Co., v. Board of Water Supply, et. al* , 97 Hawaii 544 (App. 2001).

Substitution of listed subcontractor prohibited; HRS §103D-302(b) precludes the substitution of a listed subcontractor after bid opening, at least in cases where the anti-bid shopping purpose of the listing requirement may be undermined. Any other conclusion would nullify the underlying intent of the listing requirement. *Hawaiian Dredging Construction Company v. City & County of Honolulu, PCH 99-6* (August 9, 1999).

Substitution of listed subcontractor may be justifiable; Where substitution of a listed subcontractor after bid opening is required for reasons beyond the bidder’s control, replacement of the subcontractor may be justifiable. *Hawaiian Dredging Construction Company v. City & County of Honolulu, PCH 99-6* (August 9, 1999).

Failure to list subcontractor renders bid nonresponsive; exception; The failure of a bidder to list its subcontractors results in the submission of a nonresponsive bid. Nevertheless, the provisions of HRS §103D-302(b) and HAR §3-122-21(a)(8) allow such a potentially fatal omission to be overcome provided that (1) acceptance of the bid is in the best interest of the State, and (2) the value of the unlisted work is equal to or less than one percent of the total bid amount. *Okada Trucking Co., Ltd. v. Board of Water Supply, PCH 99-11* (November 10, 1999); *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2* (May 19, 1998). *Hawaiian Dredging Construction Company v. City & County of Honolulu, PCH 99-6* (August 9, 1999).

Listing of subcontractor required; Once a bidder names a subcontractor, that subcontractor cannot be substituted, unless substitution is permitted pursuant to HRS §103D-302(g). Conversely, if a bidder does not name a subcontractor for specialty work and the bidder subsequently wishes to use a subcontractor to perform such work, the bidder will similarly not be allowed to do so unless authorized to do so pursuant to HRS §103D-302(g). *Okada Trucking Co. v. Board of Water Supply, et. al* , 97 Hawaii 544 (App. 2001).

Listing of subcontractor required; The provisions of HRS §103D-302(b) and HAR §3-122-21(a)(8) are clear and unequivocal. They state that the bidder shall provide the name of each subcontractor to be engaged to perform on the contract with the bidder. Consequently, the bidder had no option to elect to provide or not to provide the name of its subcontractor even where the value of the work to be performed by the subcontractor was one percent or less than the total bid amount. The consequences of a bidder’s failure to provide the name of each subcontractor as required by the IFB, statutes and rules would result in a non-responsive bid that must be rejected. *Okada Trucking Co., Ltd. v. Board of Water Supply, et. al, PCH 99-11* (November 10, 1999)(rev’d on other grounds).

Absence of binding agreement with subcontractor contrary to State’s best interest; The bidder’s failure to have a subcontractor bound and ready to perform on the contract at the time of bid submission, let alone at bid opening, resulted in a non-responsive bid which should have been rejected. The attempt to allow the bidder to rectify its failure by obtaining a subcontractor after bid opening, violated the provisions of the Code which were designed to treat all bidders fairly and equitably in their dealings with the government procurement system and to increase public confidence in the integrity of the government procurement system. Thus, the procurement officer’s determination waiving the non-responsive aspects of the bidder’s bid as being in the best interest of the state and awarding the project to the bidder was contrary to the provisions of the Code and the rules. *Okada Trucking Co., Ltd. v. Board of Water Supply, et. al, PCH 99-11* (November 10, 1999)(rev’d).

Low bid only one factor in best interest determination; In determining whether acceptance of Intervenor's bid is in the best interest of the City, the fact that Intervenor is the lowest bidder cannot be ignored. However, it should not be the only factor in determining whether it is in the City's best interest to accept Intervenor's bid, as even the lowest bid should not be accepted if it would be contrary to the expressed purposes and principles of the Code. *KD Construction, Inc. v. City & County of Honolulu, et al., PCH-2001-9 (December 26, 2001).*

Post-award negotiations prohibited; If Intervenor is allowed to negotiate with subcontractors after bid award, it would not be in the City's best interest to accept Intervenor's bid. The subcontractor listing requirement is designed to guard against bid shopping by a contractor. *KD Construction, Inc. v. City & County of Honolulu, et al., PCH-2001-9 (December 26, 2001).*

Listing of subcontractors; requirement to list second-tier subcontractors; There is no requirement that bidders list subcontractors below the first tier. Rather, the listing requirement is aimed entirely at preventing the general contractor from bid shopping. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Listing of subcontractors; nature and scope of work; While bidders are not required to list second-tier subcontractors, HRS §103D-302(b) does require that bidders disclose the nature and scope of the work to be performed by its listed subcontractors. This disclosure is necessary to prevent a bidder from listing more than one subcontractor for the same work, then following the award of the contract, bid shop among those listed. This problem is avoided by requiring the bidder to disclose in its bid the work to be performed by each subcontractor and use the listed subcontractor to perform only the work previously disclosed in the bid. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Failure to disclose nature and scope; nonresponsive bid; The failure to adequately and unambiguously disclose the nature and scope of the work to be performed by each subcontractor may render the bid nonresponsive regardless of whether there is evidence of bid shopping. These principles also dictate that a subcontractor can only subcontract work that is included within the nature and scope of its work as disclosed in the bid. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Nature and scope of subcontractor's work; ambiguity construed against bidder; A problem may arise where it is unclear whether certain items of work are included in the nature and scope of a subcontractor's work as described in the bid. In that event, the Hearings Officer must look to the plain language of the disclosure and construe any ambiguity against the bidder. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Failure to list subcontractor; waiver; HRS §103D-302(b) does not preclude waiver of a bidder's failure to list a subcontractor who had not been "lined up and contractually bound" to perform the contract on bid opening date. *Okada Trucking Co., Ltd. v. Board of Water Supply, et. al., ___ Hawaii Appellate ___ (2002).*

Failure to describe nature and scope of subcontractor's work; A violation of HRS §103D-302(b) occurs where a bidder fails to properly and adequately describe the nature and scope of the subcontractor's work which, in turn, creates an opportunity to bid shop; *Stoneridge Recoveries, LLC v. City and County of Honolulu; PCH-2003-5 (June 26, 2003).*

Disclosure of nature and scope of work of subcontractors; HRS §103D-302(b) requires that bidders, among other things, disclose the nature and scope of the work to be performed by its listed subcontractors. Consequently, a violation of HRS §103D-302(b) occurs where a bidder fails to properly and adequately describe the nature and scope of its subcontractors' work which, in turn, creates an opportunity to bid shop. *Oceanic Companies, Inc. v. DOT; PCH-2003-15 (July 3, 2004).*

Failure to disclose nature and scope of work of subcontractors; opportunity to bid shop remote; Even though Gonzalez Construction's bid listed two subcontractors to perform "site work" on the Project, there is no dispute that only one was properly licensed to perform that work. As such, the opportunity to bid shop between the two subcontractors by the bidder would appear to be tenuous at best. *Oceanic Companies, Inc. v. DOT; PCH-2003-15 (July 3, 2004).*

Failure to properly and adequately disclose nature and scope of work of subcontractors; Bidder must adequately and unambiguously disclose nature and scope of subcontractor's work. Failure to do so may allow bidders to circumvent the subcontractor listing requirement. And where it is unclear whether certain items of work are included in the nature and scope of the subcontractor's work as described in the bid, the Hearings Officer must look to the plain language of the disclosure and construe any ambiguity against the bidder. *Robison Construction, Inc. v. Board of Water Supply; PCH-2003-11 (August 14, 2003).*

Failure to properly and adequately disclose nature and scope of work of subcontractors; The bidder's description of the subcontractor's nature and scope of work ("tank") was ambiguous at best and the roofing/waterproofing work was not within the nature and scope of the subcontractor's work as described by the bidder in its bid. *Robison Construction, Inc. v. Board of Water Supply; PCH-2003-11 (August 14, 2003).*

C. Public Notice of Invitation; Adequate public notice of the invitation for bids shall be given a reasonable time before the date set forth in the invitation for the opening of bids. *HRS §103D-302(c).*

D. Notice of Intention; Prospective bidders/offerors shall be capable of performing the work for which offers are being called. Each prospective bidder or offeror shall file a written or facsimile *notice of intention to submit an offer* pursuant to the following:

(1) The notice shall be received not less than ten days prior to the date designated for opening.

(2) A notice shall be filed for the construction of any public building or public work when the offer submitted for the project by a contractor is or will be \$25,000.00 or more.

(3) A notice need not be filed for the procurement of goods and services, unless specified in the solicitation.

(4) The requirement for a notice may be waived if there is only one offeror and the procurement officer concludes that acceptance of the bid will be in the best interest of the public.

HAR §3-122-108.

Cases:

Failure to file notice of intent; HAR §3-122-108(a)(4) provides the procurement officer with the authority to waive the notice requirement if the procurement officer concludes that acceptance of the bid will be in the best interest of the public. A plain and logical reading of HAR §3-122-108 leads to the conclusion that HAR §3-122-108(a)(4) was designed to ensure that the public interest would not be frustrated by a noncompliance with the requirement of HAR §3-122-108(a). *Standard Electric, Inc. v. City & County of Honolulu, et. al, PCH 97-7 (January 2, 1998).*

Failure to file notice as basis for rejecting bid; A procuring agency's existing policy of automatically rejecting bids in all cases where a notice of intention to submit a bid was not filed in a timely manner flies in the face of HAR §3-122-108(a)(4) and does not provide a legitimate basis for the denial of a waiver. *Standard Electric, Inc. v. City & County of Honolulu, et. al, PCH 97-7 (January 2, 1998).*

Savings of public funds rather than adherence to technical requirement preferable; A savings of \$21,000 of public funds would do more to foster public confidence in the integrity of the procurement system than would a strict adherence to a largely technical requirement. The requirement of HAR §3-122-108(a) was not meant to cost public bodies thousands of dollars by requiring acceptance of higher bids for mere technical violations. *Standard Electric, Inc., vs. City & County of Honolulu, et. al, PCH 97-7 January 2, 1998).*

Notice of intention; responsibility determination; Neither HAR § 3-122-108 nor HAR §3-122-110 requires the procuring agency to complete the responsibility determination prior to bid opening. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000).*

E. Late Bids; Any notice of withdrawal, notice of modification of a bid with the actual modification, or any bid received after the time and date set for receipt and opening is late. *HAR §3-122-29.*

(1) A late bid, late modification, or late withdrawal shall *not* be considered late if received before contract award *and* would have been timely but for the action or inaction of personnel within the procurement activity.

(2) A late bid or late modification will not be considered for award and shall be returned to the bidder unopened as soon as practicable, accompanied by a letter from the procurement activity stating the reason for its return.

Cases:

Late proposal; exception; The disposition of late proposals is governed by the provisions of HAR §3-122-50 together with the provisions of HAR §§3-122-49 and 3-122-29 and expressly provide that any proposal received after the time set in the RFP is late and will not be considered. As an exception, a proposal filed after the designated deadline shall not be considered late but only if 1) it was received before the contract award, and 2) it would have been timely except for the action or inaction of the procuring agency. *Hawaii Newspaper Agency, et.al. v. State Dept. of Accounting & General Services, et. al, and Milici Valenti Ng Pack v. State Dept of Accounting & General Services, et. al PCH 99-2 and PCH 99-3 (consolidated)(April 16, 1999).*

Timeliness of bid submission; "mailbox rule"; The "mailbox rule" which provides that acceptance is effective upon a timely and proper mailing is inapplicable where the solicitation required that bids be received by 2:00 p.m. Thus, a bid received 32 minutes after the 2:00 p.m. deadline is late. *Superior Protection, Inc. v. Department of Transportation; PCH-2004-12 (August 18, 2004).*

F. Mistakes in Bids; Correction or withdrawal of a bid because of an *obvious mistake* in the bid is permissible to the extent it is not contrary to the best interest of the government agency or the fair treatment of other bidders. *HAR §3-122-31.*

(1) A bidder may remedy a mistake in a bid discovered before the time and date set for opening by withdrawing or correcting the bid. Corrections to bids after opening but prior to award may be made if the mistake is attributable to an arithmetical error.

(2) If the mistake is a minor informality which does not affect price, quantity, quality, delivery, or contractual conditions, the procurement officer may waive the informalities or allow the bidder to request correction by submitting proof of evidentiary value which demonstrates that a mistake was made.

(3) Examples of mistakes include typographical errors, transposition errors, failure to sign the bid or provide an original signature, but only if the unsigned bid or photocopy is accompanied by other material indicating the bidder's intent to be bound. In addition, if the mistake is obvious that if allowed to be corrected or waived is in the best interest of the governmental agency or for the fair treatment of other bidders, and the chief procurement officer concurs with this determination, the procurement officer shall correct or waive the mistake. *HAR §3-122-31*.

(4) If the mistake is not allowable under (1) and (2) but is an obvious mistake that if allowed to be corrected is in the best interest of the government or the fair treatment of the other bidders, and the chief procurement officer concurs in this determination, the procurement officer shall correct or waive the mistake.

(5) Correction or withdrawal of bids after award is not permissible except when the chief procurement officer makes a written determination that it would be unreasonable not to allow the mistake to be remedied or withdrawn.

Cases:

Incomplete bid; waiver; The failure of a bidder to complete portions of its bid document may, under certain factual circumstances, constitute a "mistake" which should be allowed to be corrected or waived in order to make it responsive to the solicitation so long as such action is consistent with both *HAR §3-122-31* and the general purposes of the Code. *The Systemcenter, Inc. v. State Dept. of Transportation, PCH-98-9 (December 10, 1998)*.

Correction of obvious mistake must be in government's best interest; Correction of a mistake that is neither an arithmetical error nor a minor informality must be in the best interest of the DOE. However, questions of the responsiveness of a bid relate to conformity with the invitation and are generally not curable after bid opening. *Southern Food Groups, L.P. v. Dept. of Educ., et. al., 89 Haw. 443 (1999)*.

Correction not in agency's best interest if unfair to bidders; A correction would not have been in the best interest of the DOE, inasmuch as it would have been unfair to the other bidders. The specifications furnished Meadow Gold were clear and specific, and they were ignored. Meadow Gold cannot realistically be heard to say that it was relying on the minor irregularities clause of *HAR §3-122-31*. On the record, there is no abuse of discretion. *Southern Food Groups, L.P. v. Dept. of Educ., et. al., 89 Haw. 443 (1999)*.

Discretion of chief procurement officer final and conclusive; The discretion of the head of the DOE in concurring with a determination that a mistake is correctable shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law. *Southern Food Groups, L.P. v. Dept. of Educ., et. al., 89 Haw. 443 (1999)*.

Correction of error in extension price according to solicitation provision permitted provided that application of provision leads to reasonable result. Where a discrepancy exists between the stated unit price and the stated extended price in a bid, correction pursuant to a provision in the IFB giving precedence to unit prices over extended prices is permitted provided that the application of the provision leads to a reasonable result that is not in conflict with the Code or its implementing rules, including HAR §3-122-31(c)(3). *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001); *Site Engineering, Inc. v. DOT*; PCH-2003-12 (September 15, 2003); *Phillip G. Kuchler, Inc. v. DOT*; PCH-2003-21 (2004).

Obvious mistake must be evident from face of bid documents; extrinsic evidence prohibited. Since the mistake and the intended bid must be evident on the face of the bid documents, extrinsic evidence may not be considered. However, the procurement officer may consider the other bids submitted and rely on his or her own experiences and common sense. By contrast, where the intended bid cannot be determined from the bid documents alone, a mistake is not correctable as an obvious mistake. HAR §3-122-31(c)(3). *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

In determining whether a mistake is an obvious one, reliance on worksheets improper. Respondent's use of RCI's worksheets was improper. However, the mere fact that a bidder provides bid worksheets or other materials in connection with its claim of mistake does not mean that resort to these materials was necessary to determine the intended bid. *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

Correction of obvious mistake requires correction be in best interest of agency or for fair treatment of bidders. HAR §3-122-31(c)(3) also requires that the chief procurement officer concur in the determination that the contemplated correction would be in the best interest of the agency or for the fair treatment of other bidders. In that regard, a correction would not be in the agency's best interest where it would be unfair to the other bidders. *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001); *Southern Food Groups, LP v. Dept. of Educ. et. al.*, 89 Haw. 443 (1999).

Correction of error in unit price pursuant to HAR §3-122-31(c)(3) was proper. Correction of a mistake in the unit price was proper where the stated unit price was substantially higher than the other bid prices for the item; extending the bid on the basis of the unit price resulted in an extended bid about six times greater than the highest bid for the item; the extended total when added to the other extended totals in the bid equaled the price RCI bid as its total bid price; the intended unit price was consistent with the other bidder's prices and could easily be determined by dividing the extended total price for the item by the number of units. *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

HRS §103D-302(g) prohibits correction of mistake after bid opening that is prejudicial to the interest of the public or to fair competition. The public's interest includes an interest in ensuring the integrity of the procurement process and avoiding bid manipulation. Permitting the bidder to elect between two prices, only one of which will result in an award to the bidder, after competitors' prices are revealed allows the bidder an unfair advantage contrary to the Code. *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

HAR §3-122-31 was intended to permit relief for certain mistakes; underlying policy. In promulgating the mistake in bid rules in HAR §3-122-31, the Procurement Policy Board presumably desired to permit relief for certain mistakes made in the calculation and submission of bids to allow the government to take advantage of what it knows or should know is an error by the bidder and to avoid depriving the government of an advantageous offer solely because the bidder made a mistake. Because the discovery of bid mistakes may occur in the period after bid opening, however, when bid prices have been exposed and market conditions may have changed, the rule also reflects a concern with protecting the integrity of the competitive bidding system by strictly limiting the ability to make bid corrections. If, as a matter of policy, the Board or the Legislature prefers a rule that sets the unit price as the intended price in all cases involving a discrepancy between unit price and extension price, they can so provide. They have not done so and the Hearings Officer has no authority, nor inclination to establish a policy contrary to that previously established by the Board and the Legislature. *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

Requirement that contracting official concur with determination that mistake was obvious and in best interest of agency; The obvious intent of this requirement was to provide an additional layer of assurance that the requirements of HAR §3-122-31(c)(3) had been met before a bidder was allowed to correct its bid. It was not intended to prevent a bidder from protesting an agency's decision not to allow a correction under HAR §3-122-31(c)(3). *Site Engineering, Inc. v. DOT; PCH-2003-12* (September 15, 2003).

G. Bid Opening; Bids shall be opened publicly in the presence of one or more witnesses, at the time and place designated in the IFB. *HRS §103D-302(d)*.

H. Evaluation of Bids; Bids shall be evaluated based upon the requirements set forth in the IFB. The invitation shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the IFB. *HRS §103D-302(f); HAR §3-122-33*.

Cases:

Ambiguous bid; nonresponsive; Meadow Gold's double bid was ambiguous. The DOE is not required to engage in telepathy to discern what Meadow Gold intended by submitting two apparently different bids. Meadow Gold's multiple or double bid was nonresponsive to the Bid Solicitation and was properly rejected. *Southern Food Groups, L.P. v. Dept. of Educ., et.al., 89 Haw. 443* (1999).

I. Award of Contract; The contract shall be awarded with reasonable promptness by *written notice* to the lowest *responsible* and *responsive* bidder whose bid meets the requirements and criteria set forth in the invitation for bids. In the event all bids exceed available funds as certified by the appropriate fiscal officer, the head of the purchasing agency responsible for the procurement in question is authorized in situations where time or economic considerations preclude resolicitation of work of a reduced scope to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsible and responsive bidder, in order to bring the bid within the amount of available funds. *HRS §103D-302(h)*.

Cases:

Award requires written notice; HRS §103D-302(h) specifically requires that a contract be awarded by written notice. Accordingly, a verbal conversation between an agency representative and a bidder cannot constitute the award of a contract. *Makakilo Retrofit Pilot Project vs. City and County of Honolulu, PCH 95-1* (March 17, 1995).

Award of contract on same day as judgment permissible; Nothing in HRS Chapter 103D precludes an agency from executing a contract on the same day that the Hearings Officer enters judgment. *Southern Food Groups, L.P. v. Dept. of Educ., et.al.*, 89 Haw. 443 (1999).

Notice of intention and responsibility determination; Neither HAR §3-122-108 nor HAR §3-122-110 requires the procuring agency to complete the responsibility determination prior to bid opening. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4* (June 8, 2000).

Tax clearance certificate matter of responsibility; The tax clearance certificate requirement relates to and remains a matter of responsibility rather than responsiveness. Petitioner was entitled to present the tax clearance statement after bid opening and up to the time of award, notwithstanding the requirement in the Notice to Bidders, and Respondent's rejection of Petitioner's bid on that basis was improper. *Standard Electric, Inc., vs. City & County of Honolulu, et.al.*, PCH 97-7 (January 2, 1998).

Responsible bidder; determination at award; A responsible bidder is a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance. Capability refers to capability at the time of award of contract. Accordingly, these definitions are consistent with the conclusion that responsibility may be determined at any time up to the awarding of the contract. *Browning-Ferris Industries of Hawaii, Inc. v. Dept. of Transportation, PCH 2000-4* (June 8, 2000); *Okada Trucking Co., v. Board of Water Supply, et. al*, 97 Hawaii 544 (App. 2001).

Licensing requirement; exemption; The contractor's licensing exemption set out in HRS §444-2(10) applies in situations involving work to be performed pursuant to an invitation for bids only when the scope of the relevant public works project requires, inter alia, additional qualifications beyond those established by the licensing law. In making a factual determination of whether such an exemption applies, the Hearings Officer looks first to the content of the Invitation for Bids itself. *Makakilo Retrofit Pilot Project v. City & County of Honolulu, PCH 95-1* (March 17, 1995).

Responsibility; performance capability; determined at award; Responsibility involves an inquiry into the bidder's ability and will to perform the subject contract as promised. Responsibility concerns how a bidder will accomplish conformance with the material provisions of the contract. It addresses the performance capability of the bidder, and normally involves an inquiry into the potential contractor's financial resources, experience, management past performance, place of performance, and integrity. A bidder's responsibility is not determined at bid opening but rather is determined at any time up to the award based upon information available up to that time. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6* (August 9, 1999).; *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4* (June 8, 2000).

Responsibility; nonresponsive bid; A bidder's non-responsibility can render an otherwise responsive bid to be non-responsive if it has the effect of causing the bid to vary materially from the requirements contained in the agency's Invitation for Bids. Generally, a requirement is material if granting a compliance variance would give that bidder a substantial advantage over its competitors. The conduct of a bidder in listing a subcontractor without the requisite experience may result in a substantial pricing advantage over other bidders and constitute a material deviation from the terms of the invitation which renders the bid non-responsive. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6* (August 9, 1999).

Responsibility; ability to perform; A bidder's ability to perform may warrant close scrutiny under circumstances where even though at the time of bid opening, the general contractor (or its designated subcontractors) had the required license(s) to perform, neither the general contractor nor the subcontractors had the actual workforce needed to accomplish the project. Nevertheless, such circumstances do not reflect noncompliance with the requirements for submitting a bid. The size and makeup of a construction firm can fluctuate considerably depending upon the volume of their work at any given time, and as long as they are properly licensed they may expand their infrastructure to meet the needs of a given project. *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2* (May 19, 1998).

Bidder responsibility; determination at award; In the absence of special circumstances (such as the implementation of important social or economic policy), the regularly followed principle is that the characteristics of a bidder (such as its past payment of taxes – as demonstrated by the filing of a tax clearance certificate) is a matter of bidder responsibility rather than a matter of bid responsiveness. Accordingly, such a requirement may generally be met at any time before a contract is entered into, even in the presence of standard language in the Notice to Bidders that such a requirement be met at the time of bid opening. *Standard Electric, Inc. v. City & County of Honolulu, et. al, PCH 97-7 (January 2, 1998).*

Bidder responsibility; ability to obtain resources; A bidder's responsibility may be established by a sufficient showing that it possesses the ability to obtain the resources necessary to perform its contractual obligations. The procuring agency will be given wide discretion and will not be interfered with unless the determination is unreasonable, arbitrary or capricious. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000).*

Responsive bid; material nonconformity; Bid responsiveness refers to the question of whether a bidder has promised in the precise manner requested by the government with respect to price, quality, quantity, and delivery. A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. Therefore, a bid that contains a material nonconformity must be rejected as nonresponsive. Material terms and conditions of a solicitation involve price, quality, quantity, and delivery. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH-99-6 (August 9, 1999); Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998).; Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000).*

Responsive bid; material nonconformity; Although the 5-year coating experience requirement was intended to test bidder responsibility, it nevertheless had a direct impact on price. A contractor can obtain a considerable saving by utilizing subcontractors with less experience. As a result, a contractor may gain a substantial bid pricing advantage over other bidders whose bids were based upon prices from more experienced subcontractors. Accordingly, the Intervenor's listing of a subcontractor who lacked the required experience afforded Intervenor a substantial advantage with respect to bid pricing, constituted a material deviation from the terms of the IFB and as a result, rendered its bid nonresponsive. *Hawaiian Dredging Construction Co. vs. City & County of Honolulu, PCH-99-6 (August 9, 1999)*

Responsive bidder; definition; A responsive bidder under HRS §103D-104 and HAR §3-120-2 is defined as "a person who has submitted a bid or offer which conforms in all material respects to the invitation for bids or requests for proposals." *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999); Okada Trucking Co. v. Board of Water Supply, et. al., 97 Hawaii 544 (App. 2001).*

Material deviation from solicitation; multiple bids; price; It is elementary that submission of two bids in a sealed competitive bidding process that permits submission of only one bid is a material deviation from the Bid Solicitation special conditions and is nonresponsive. Moreover, Meadow Gold's deviation directly involved price, a term that is typically and traditionally material. *Southern Food Groups, L.P. v. Dept. of Educ., et. al, 89 Haw. 443 (1999).*

Ambiguous bid; nonresponsive; Meadow Gold's double bid was ambiguous. The DOE is not required to engage in telepathy to discern what Meadow Gold intended by submitting two apparently different bids. Meadow Gold's multiple or double bid was nonresponsive to the Bid Solicitation and was properly rejected. *Southern Food Group, L.P. v. Dept. of Educ., et. al., 89 Haw. 443 (1999).*

Responsiveness; determination based solely upon requirements in solicitation; In a competitive sealed bidding procurement, bids must be evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally at the time of bid opening. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998).*

Responsiveness; determination based upon requirements in solicitation; Matters of responsiveness must be discerned solely by reference to materials submitted with the bid and facts available to the government at the time of the bid opening. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000).*

Responsiveness; failure to list subcontractor; Except in situations which involve the post award refusal or inability of a subcontractor to honor its agreement with the bidder, the failure of a bidder to list the subcontractor who will actually be performing the subcontracted work renders that bid non-responsive. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999).*

Responsiveness; failure to list subcontractor; The failure of a bidder to list its subcontractors results in the submission of a non-responsive bid. Nevertheless, the provisions of HRS §103D-302(b) and HAR §3-122-21(a)(8) allow such a potentially fatal omission to be overcome provided that (1) acceptance of the bid is in the best interest of the State, and (2) the value of the unlisted work is equal to or less than one percent of the total bid amount. *Okada Trucking Co., Ltd., v. Board of Water Supply et.al., PCH 99-11 (November 10, 1999)(rev'd on other grounds); Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998).*

Failure to list subcontractor; no binding agreement; The failure of a bidder (general contractor) to have a subcontractor actually bound to perform any portion of the required work – which could not lawfully be performed by the bidder itself – results in a nonresponsive bid. Nevertheless, the provisions of HRS §103D-302(b) and HAR §3-122-21(a)(8) allow such a potentially fatal omission to be overcome provided that (1) acceptance of the bid is in the best interest of the State, and (2) the value of the unlisted work is equal to or less than one percent of the total bid amount. *Okada Trucking Co., Ltd., vs. Board of Water Supply et. al, PCH 99-11 (November 10, 1999)(rev'd on other grounds).*

Bidder's reliance on document not a part of invitation is erroneous; Any purported reliance on an outdated HDOT handout, which did not waive the pre-certification requirement that qualifying DBE subcontractors must have been certified as such prior to the bid opening date, which had been subsequently revised, and which was not even part of the invitation for bids, was misplaced and erroneous. *Fletcher Pacific Construction Company, Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998).*

Failure to comply with DBE pre-certification requirement for subcontractors renders bid nonresponsive; good faith exception; Because the listed subcontractor was not certified as a DBE subcontractor prior to bid opening as required by the terms of the invitation for bids, the subcontractor's bid price could not be used in calculating whether the general contractor met the 17.1% requirement, and without it, the general contractor did not meet that goal. Accordingly, unless the general contractor could show that it made good faith efforts to meet the DBE goal (as permitted by the terms of the solicitation), its bid would have to be rejected as non-responsive. *Fletcher Pacific Construction Company, Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998).*

Failure to comply with requirement for pre-certification of DBE subcontractors and lack of good faith determination renders bid nonresponsive; The failure of the general contractor to actually meet the 17.1% DBE goal, combined with the failure of the State to articulate a determination that the general contractor had met the DBE good faith efforts goal, meant that the general contractor's bid was nonresponsive. The responsibility for making an initial determination on this issue rests with the contracting agency rather than with the reviewing authority. *Fletcher Pacific Construction Company, Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998).*

Responsiveness; standard; The standard to be applied in determining the "responsiveness" of a bid is whether a bidder has promised in the precise manner requested by the government with respect to price, quantity, quality, and delivery. If this standard is satisfied, the bidder is effectively obligated to perform the exact thing called for in the solicitation. *Starcom Builders, Inc. v. Board of Water Supply; PCH-2003-18 (October 18, 2003); Greenleaf Distribution Services, Inc., et al. v. City & County of Honolulu, PCH-2004-7 (September 2, 2004).*

Authorization to negotiate with lowest bidder; That section authorizes contracting officials to negotiate an adjustment of the bid price where (1) “all bids exceed available funds” and (2) “time or economic considerations preclude resolicitation of work of a reduced scope.” *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004).*

J. Funding of Contract; Contracts awarded pursuant to sections 103D-302, 103D-303 or 103D-306 shall not be binding unless comptroller endorses a certificate that there are sufficient funds to cover the amount required by the contract. *HRS §103D-309(a).*

K. Partially-Funded Contracts; Certification of partial funding of a contract is permitted when an immediate solicitation will result in significantly more favorable contract terms and conditions to the State than a solicitation made at a later date. *HAR §3-122-102(c).*

Cases:

Funding of contract; basis; The requirement in HRS §103D-309 that a procuring agency certify that sufficient funds are available to cover the contract prior to the awarding of the contract was presumably based upon the underlying objective of the Code. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Requirement of adequate funding; promotes fiscal integrity and competition; Requiring that adequate funding be available to cover the entire contract before an agency is permitted to enter into the contract promotes fiscal integrity and fosters open, broad-based competition. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Partially-funded contracts; rationale; In promulgating the narrow exception in HAR §3-122-102(c), the Board desired to avoid depriving the agency of the ability to award a partially-funded contract where such a contract will result in significantly more favorable contract terms and conditions than subsequent solicitations. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Partially-funded contracts; evidence; burden of proof; In order to award a partially-funded contract, the agency must show that the contract will be significantly more favorable than contracts obtained from subsequent solicitations. Thus, where the protestor presents evidence that the procuring agency intends to award a partially-funded contract, it is incumbent upon the agency to establish its authority to award such a contract under HAR §3-122-102(c). *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Partially-funded contract; significantly more favorable; Mere speculation over the advantages of a partially-funded contract and disadvantages of subsequent solicitations is not enough. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

IV. COMPETITIVE SEALED PROPOSALS

A. Generally; when used: When head of a purchasing agency determines *in writing* that use of competitive sealed bidding is either not practicable or not advantageous to the State, competitive sealed proposals may be utilized. Proposals shall be solicited through a request for proposals. *HRS §103D-303*.

Cases:

Bidding not practicable; written determination required; The provisions of HRS §103D-303(a) which require that, prior to proceeding with “competitive sealed proposals”, the agency’s appropriate official make a written determination that the use of “competitive sealed bidding” is not practicable or not advantageous, is not met by either 1) implication from the agency’s act of issuing a request for proposals, nor 2) extraction from the content of the request for proposals itself. *PRC Public Sector, Inc. v. County of Hawaii, PCH 96-3 (May 31, 1996)*.

B. Notice of Intention; Prospective bidders/offerors shall be capable of performing the work for which offers are being called. Each prospective bidder or offeror shall file a written or facsimile notice of intention to submit an offer pursuant to the following:

(1) The notice shall be received not less than ten days prior to the date designated for opening.

(2) A notice shall be filed for the construction of any public building or public work when the offer submitted for the project by a contractor is or will be \$25,000.00 or more.

(3) A notice need not be filed for the procurement of goods and services, unless specified in the solicitation.

(4) The requirement for a notice may be waived if there is only one offeror and the procurement officer concludes that acceptance of the bid will be in the best interest of the public.

HAR §3-122-108.

Cases:

Failure to file notice of intent as basis for bid rejection; A procuring agency’s existing policy of automatically rejecting bids in all cases where a notice of intention to submit a bid was not filed in a timely manner flies in the face of the provisions of HAR §3-122-108(a)(4) and does not provide a legitimate basis for the denial of a waiver. *Standard Electric, Inc. v. City & County of Honolulu, et. al, PCH 97-7 (January 2, 1998)*.

Savings of public funds rather than adherence to technical requirement preferred; A savings of \$21,000 of public funds would do more to foster public confidence in the integrity of the procurement system than would a strict adherence to a largely technical requirement. The requirement of HAR §3-122-108(a) was not meant to cost public bodies thousands of dollars by requiring acceptance of higher bids for mere technical violations. *Standard Electric, Inc., vs. City & County of Honolulu, et. al, PCH 97-7 January 2, 1998*).

Notice of intention; completion of responsibility determination prior to bid opening not required; HAR §§3-122-108 and 3-122-110 require the procurement officer to undertake to determine a bidder's responsibility once notified of the bidder's intention to bid. Neither section, however, requires the procuring agency to complete the responsibility determination prior to bid opening. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000).*

C. Content of Request; The request for proposals shall state the relative importance of price and other evaluation factors. *HRS §103D-303(e).*

Cases:

Sufficiency of request for proposals; criteria; The language of HRS §103D-303(e) quite clearly sets out a requirement that the request for proposals state the relative importance of price and other evaluation factors. And when a procuring agency uses a numerical evaluation system, HAR §3-122-53(b) requires, inter alia, that the relative priority to be applied to each evaluation factor shall also be set out in the request for proposals. *PRC Public Sector, Inc. v. City & County of Honolulu, PCH 96-3 (May 31, 1996).*

Changes to criteria after opening; It is fundamental to the fairness of the procurement process that changes in the criteria for selection not be made after proposals have been opened and their contents have become known to one or more of the evaluators. HAR §3-122-53(g) states that an evaluation committee may meet to discuss the evaluation process and the weighing of evaluation factors "before evaluation", and having knowledge of the costs of proposals is sufficient for an evaluation of those costs to have begun. *PRC Public Sector, Inc. v. County of Hawaii, PCH 96-3 (May 31, 1996).*

D. Opening of Proposals; Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation.

E. Late Proposals; Any proposal received after the time and date set for receipt and opening is late. A late proposal shall not be considered late if received before contract award and would have been timely but for the action or inaction of personnel within the procurement activity. *HAR §3-122-50.*

Cases:

Late proposal; exception; The disposition of late proposals is governed by the provisions of HAR §3-122-50 together with the provisions of HAR §§3-122-49 and 3-122-29 and expressly provide that any proposal received after the time set in the RFP is late and will not be considered. As an exception, a proposal filed after the designated deadline shall not be considered late but only if 1) it was received before the contract award, and 2) it would have been timely except for the action or inaction of the procuring agency. *Hawaii Newspaper Agency, et.al. v. State Dept. of Accounting & General Services, et. al, and Milici Valenti Ng Pack v. State Dept of Accounting & General Services, et. al PCH 99-2 and PCH 99-3 (consolidated)(April 16, 1999).*

F. Discussions with Offerors/Revisions; Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors. *HRS §103D-303(f).*

Cases:

Best and final offers; unfair treatment; The conduct of a procurement officer in failing to establish a deadline for the submission of best and final offers from all priority-listed offerors, ignoring other finalists in favor of asking only one finalist to make such a submission, and doing so after the selection of a winning offeror had already been made, violated the provisions of HRS §103D-303 and HAR §3-122-54. *PRC Public Sector, Inc. v. County of Hawaii, PCH 96-3 (May 31, 1996).*

G. Award; Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. *HRS §103D-303(g); HAR §3-122-57.*

Cases:

Alteration of criteria; violation; The unauthorized alteration of a proposal's evaluative methodology (in this case by the addition of another weighty evaluation factor) without proper written notification constitutes a violation of HRS §103D-303(g) which specifies that the award be made based upon price and the evaluation factors set forth in the request for proposals and that no other factors or criteria shall be used in the evaluation. *PRC Public Sector, Inc. v. County of Hawaii, PCH 96-3 (May 31, 1996).*

V. PRE-BID CONFERENCE

Generally; At least 15 days prior to the submission of bids pursuant to §103D-302 for a construction or design-build project with a total estimated contract value of \$500,000 or more, and at least 15 days prior to the submission of proposals pursuant to §103D-303 for a construction or design-build project with a total estimated contract value of \$100,000 or more, the head of the purchasing agency shall hold a pre-bid conference and shall invite all potential interested bidders, offerors, subcontractors, and union representatives to attend. HRS §103D-303.5.

Cases:

Failure to attend pre-bid conference; The failure to attend a pre-bid conference was not a proper basis for a finding of nonresponsiveness. *Greenleaf Distribution Services, Inc. v. City and County of Honolulu*; PCH-2004-7 (September 2, 2004).

VI. EMERGENCY PROCUREMENTS

A. Generally; requisites: Pursuant to HRS §103D-307, the head of a purchasing agency may obtain a good, service, or construction essential to meet an emergency by means other than specified in this chapter when the following conditions exist:

(1) A situation of an unusual or compelling urgency creates a threat to life, public health, welfare, or safety by reason of major natural disaster, epidemic, riot, fire, or such other reason as may be determined by the head of that purchasing agency;

(2) The emergency condition generates an immediate and serious need for goods, services, or construction that cannot be met through normal procurement methods and the government would be seriously injured if the purchasing agency is not permitted to employ the means it proposes to use to obtain the goods, services, or construction; and

(3) Without the needed good, service, or construction, the continued functioning of government, the preservation or protection of irreplaceable property, or the health and safety of any person will be seriously threatened.

B. Approval from contracting official; written determination; The emergency procurement shall be made with such competition as is practicable under the circumstances and, where practicable, approval from the chief procurement officer shall be obtained prior to the procurement. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

Cases:

VII. CANCELLATION OF SOLICITATIONS

A. Generally; requisites: Pursuant to HRS §103D-308, an invitation for bids, a request for proposals, or other solicitation may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the governmental body which issued the invitation, request, or other solicitation. The reasons therefore shall be made a part of the contract file.

Cases:

Underlying policy; HRS §103D-308 reflects a policy of giving precedence to the government's ability to cancel a solicitation over a bidder's interest in having the solicitation go forward where the government's best interests would be served. Justification for this policy can be found in the fact that in general, the cancellation or rejection of all bids treats all bidders equally. This is in contrast to instances where an agency treats certain bidders differently, such as the rejection of a bidder as nonresponsive. *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004).*

Underlying policy considerations; State's best interest; In promulgating HAR §3-122-96(a)(2), the Procurement Policy Board presumably was cognizant of the potentially serious adverse impact a cancellation might have on the integrity of the competitive bidding system once the bids are revealed. Among other things, the cancellation of a solicitation after bid opening tends to discourage competition because it results in making all bidders' prices and competitive positions public without an award. With that in mind, the Board identified certain specific circumstances in HAR §3-122-96(a)(2) where the cancellation of a solicitation may be in the best interests of the agency and therefore justified, even after bid opening. *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004).*

Best interest determination must consider policy underlying Code; A best interest determination must be consistent with the underlying purposes of the Code, including, but not limited to the providing for fair and equitable treatment of all persons dealing with the procurement process and maintaining the public's confidence in the integrity of the system. The Code also requires that all parties involved in the negotiation, performance, or administration of state contracts shall act in good faith. *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004).*

Cancellation; all factors of significance to agency; Cancellation under HAR §3-122-96(a)(2)(C) would only be appropriate where the solicitation failed to provide for consideration of all factors of significance to the agency. Included among those factors, of course, is the government's interest in avoiding favoritism and corruption in the bidding process. *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004).*

Respondent not precluded from raising additional reasons for cancellation; Respondent was not precluded from alleging that the cancellation was justified because the specifications were inadequate and that the solicitation did not provide for the consideration of all factors of significance to the agency, in addition to the claim that there were insufficient funds to cover the contract. Moreover, the Hearings Officer noted that the Comptroller General has held that a contracting agency's initial reliance on an improper reason for canceling a solicitation is not significant if the record establishes that another proper basis for the cancellation exists. *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004) citing Peterson-Nunez Joint Venture, B-258788, Feb. 13, 1995.*

VIII. SPECIFICATIONS

A. Purpose; generally; A specification is the basis for procuring good, service, or construction item adequate and suitable for the State's needs in a cost effective manner. All specifications shall seek to promote overall competition, shall not be unduly restrictive, and provide a fair and equal opportunity for every supplier that is able to meet the State's needs. In developing specifications, unique requirements should be avoided. *HAR §3-122-10.*

B. Authority to Prepare; The chief procurement officer, with the assistance of the using agency, shall prepare and approve specifications, and may delegate, in writing, to purchasing or using agencies the authority to prepare and use its own specifications, provided the delegation may be revoked by the chief procurement officer. *HAR §3-122-11.*

C. Development; A specification should identify minimum requirements, allow for a competitive bid, list reproducible test methods to be used in testing for compliance with specifications and provide for an equitable award at the lowest possible cost. *HAR §3-122-13.*

IX. REJECTION OF BIDS AND PROPOSALS

A. Bid rejection; basis; Bids shall be rejected for reasons including, but not limited to:

(1) The bidder that submitted the bid is nonresponsive. *HRS §103D-302(h); HAR §3-122-97.*

Cases:

Tax clearance certificate matter of responsibility; The tax clearance certificate requirement relates to and remains a matter of responsibility rather than responsiveness. Petitioner was entitled to present the tax clearance statement after bid opening and up to the time of award, notwithstanding the requirement in the Notice to Bidders, and that Respondent's rejection of Petitioner's bid on that basis was improper. *Standard Electric, Inc., vs. City & County of Honolulu, et. al, PCH 97-7 January 2, 1998).*

Responsible bidder; determination at award; A responsible bidder is a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance. Capability refers to capability at the time of award of contract. Accordingly these definitions are consistent with the conclusion that responsibility may be determined at any time up to the awarding of the contract. *Browning-Ferris Industries of Hawaii, Inc. v. Dept. of Transportation, PCH 2000-4 (June 8, 2000).*

Responsibility; performance capability at award; Responsibility involves an inquiry into the bidder's ability and will to perform the subject contract as promised. Responsibility concerns how a bidder will accomplish conformance with the material provisions of the contract. It addresses the performance capability of the bidder, and normally involves an inquiry into the potential contractor's financial resources, experience, management past performance, place of performance, and integrity. A bidder's responsibility is not determined at bid opening but rather is determined at any time up to the award based upon information available up to that time. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999); Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000).*

Responsibility determination; when made; Neither HAR §3-122-108 nor HAR §3-122-110 requires the procuring agency to complete the responsibility determination prior to bid opening. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000).*

Nonresponsibility can render bid nonresponsive; material deviation; A bidder's non-responsibility can render an otherwise responsive bid to be non-responsive if it has the effect of causing the bid to vary materially from the requirements contained in the agency's Invitation for Bids. Generally, a requirement is material if granting a compliance variance would give that bidder a substantial advantage over its competitors. The conduct of a bidder in listing a subcontractor without the requisite experience may result in a substantial pricing advantage over other bidders and constitute a material deviation from the terms of the invitation which renders the bid non-responsive. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999).*

Responsibility; ability to perform; A bidder's ability to perform may warrant close scrutiny under circumstances where even though at the time of bid opening, the general contractor (or its designated subcontractors) had the required license(s) to perform, neither the general contractor nor the subcontractors had the actual workforce needed to accomplish the project. Nevertheless, such circumstances do not reflect noncompliance with the requirements for submitting a bid. The size and makeup of a construction firm can fluctuate considerably depending upon the volume of their work at any given time, and as long as they are properly licensed they may expand their infrastructure to meet the needs of a given project. *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation*, PCH 98-2 (May 19, 1998).

Bidder responsibility determined at award; In the absence of special circumstances (such as the implementation of important social or economic policy), the regularly followed principle is that the characteristics of a bidder (such as its past payment of taxes – as demonstrated by the filing of a tax clearance certificate) is a matter of bidder responsibility rather than a matter of bid responsiveness. Accordingly, such a requirement may generally be met at any time before a contract is entered into, even in the presence of standard language in the Notice to Bidders that such a requirement be met at the time of bid opening. *Standard Electric, Inc. v. City & County of Honolulu, et. al*, PCH 97-7 (January 2, 1998).

Bidder responsibility; ability to obtain resources; agency given wide discretion; A bidder's responsibility may be established by a sufficient showing that it possesses the ability to obtain the resources necessary to perform its contractual obligations. The procuring agency will be given wide discretion and will not be interfered with unless the determination is unreasonable, arbitrary or capricious. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation*, PCH 2000-4 (June 8, 2000).

Prequalification of suppliers; A clear reading of HAR §3-122-116 reflects that prequalification of suppliers is permitted, but is not required. *United Courier Services, Inc. v. DOE, et al.*, PCH -2002-10 (October 15, 2002).

(2) The bid is nonresponsive, that is, it does not conform in all material respects to the invitation for bids. *HRS §103D-302(h)*; *HAR §3-122-97*.

Cases:

Material nonconformity renders bid nonresponsive; Bid responsiveness refers to the question of whether a bidder has promised in the precise manner requested by the government with respect to price, quality, quantity, and delivery. A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. Therefore, a bid that contains a material nonconformity must be rejected as nonresponsive. Material terms and conditions of a solicitation involve price, quality, quantity, and delivery. *Hawaiian Dredging Construction Co. vs. City & County of Honolulu*, PCH-99-6 (August 9, 1999); *Environmental Recycling vs. County of Hawaii*, PCH 98-1 (July 2, 1998).; *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation*, PCH 2000-4 (June 8, 2000).

Material nonconformity renders bid nonresponsive; Although the 5-year coating experience requirement was intended to test bidder responsibility, it nevertheless had a direct impact on price. A contractor can obtain a considerable savings by utilizing subcontractors with less experience. As a result, a contractor may gain a substantial bid pricing advantage over other bidders whose bids were based upon prices from more experienced subcontractors. Accordingly, the Intervenor's listing of a subcontractor who lacked the required experience afforded Intervenor a substantial advantage with respect to bid pricing, constituted a material deviation from the terms of the IFB and as a result, rendered its bid nonresponsive. *Hawaiian Dredging Construction Co. vs. City & County of Honolulu*, PCH-99-6 (August 9, 1999).

Responsive bidder defined; A responsive bidder under HRS §103D-104 and HAR §3-120-2 is defined as “a person who has submitted a bid or offer which conforms in all material respects to the invitation for bids or requests for proposals.” *Hawaiian Dredging Construction Co. v. City & County of Honolulu*, PCH 99-6 (August 9, 1999).

Material deviation from solicitation affecting price; multiple bids; It is elementary that submission of two bids in a sealed competitive bidding process that permits submission of only one bid is a material deviation from the Bid Solicitation special conditions and is nonresponsive. Moreover, Meadow Gold’s deviation directly involved price, a term that is typically and traditionally material. *Southern Food Group, L.P. v. Dept. of Educ., et. al*, 89 Haw. 443 (1999).

Responsiveness determination; evidence of government’s best interest and savings of public funds irrelevant; The best interest of the DOE as well as the savings the DOE would have received are irrelevant, insofar as applicable statutory provisions and rules mandated the rejection of Meadow Gold’s multiple bid. *Southern Food Group, L.P. v. Dept. of Educ., et. al*, 89 Haw. 443 (1999).

Rejection of nonresponsive bid; cogent and compelling reasons unnecessary; Pursuant to HAR §3-122-97, if Meadow Gold’s bid was nonresponsive, the DOE should have rejected the bid and was not compelled to provide cogent or compelling reasons why it was in the DOE’s best interest to reject the bid. *Southern Food Group, L.P. v. Dept. of Educ., et. al*, 89 Haw. 443 (1999).

Responsiveness based solely upon requirements in solicitation; In a competitive sealed bidding procurement, bids must be evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally at the time of bid opening. *Environmental Recycling v. County of Hawaii*, PCH 98-1 (July 2, 1998).

Responsiveness; determination based upon requirements in solicitation; Matters of responsiveness must be discerned solely by reference to materials submitted with the bid and facts available to the government at the time of the bid opening. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation*, PCH 2000-4 (June 8, 2000).

Failure to list subcontractor renders bid nonresponsive; Except in situations which involve the post award refusal or inability of a subcontractor to honor its agreement with the bidder, the failure of a bidder to list the subcontractor who will actually be performing the subcontracted work renders that bid non-responsive. *Hawaiian Dredging Construction Co. v. City & County of Honolulu*, PCH 99-6 (August 9, 1999).

Exception to subcontractor listing requirement; The failure of a bidder to list its subcontractors, results in the submission of a non-responsive bid. Nevertheless, the provisions of HRS §103D-302(b) and HAR §3-122-21(a)(8) allow such a potentially fatal omission to be overcome provided that (1) acceptance of the bid is in the best interest of the State, and (2) the value of the unlisted work is equal to or less than one percent of the total bid amount. *Okada Trucking Co., Ltd., v. Board of Water Supply et. al*, PCH 99-11 (November 10, 1999)(rev’d on other grounds); *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation*, PCH 98-2 (May 19, 1998).

Exception to subcontractor listing requirement; The failure of a bidder (general contractor) to have a subcontractor actually bound to perform any portion of the required work – which could not lawfully be performed by the bidder itself – results in a nonresponsive bid since the bidder is consequently unable to meet the requirement that all subcontractors be listed in its bid. Nevertheless, the provisions of HRS §103D-302(b) and HAR §3-122-21(a)(8) allow such a potentially fatal omission to be overcome provided that (1) acceptance of the bid is in the best interest of the State, and (2) the value of the unlisted work is equal to or less than one percent of the total bid amount. *Okada Trucking Co., Ltd., vs. Board of Water Supply et. al*, PCH 99-11 (November 10, 1999)(rev’d on other grounds).

Responsiveness; standard; The standard to be applied in determining the “responsiveness” of a bid is whether a bidder has promised in the precise manner requested by the government with respect to price, quantity, quality, and delivery. If this standard is satisfied, the bidder is effectively obligated to perform the exact thing called for in the solicitation. *Starcom Builders, Inc. v. Board of Water Supply; PCH-2003-18 (October 18, 2003).*

Responsiveness; failure to attend prebid site visit; The standard to be applied in determining the “responsiveness” of a bid is whether a bidder has promised in the precise manner requested by the government with respect to price, quantity, quality, and delivery. If this standard is satisfied, the bidder is effectively obligated to perform the exact thing called for in the solicitation. As such, the Hearings Officer fails to see how the failure to attend a prebid meeting, let alone a scheduled prebid meeting, would limit or otherwise affect that obligation. Regardless of its nonattendance at a site visit, a bidder who submits a bid after having been offered the opportunity to visit the job site knowingly commits itself to perform the work at its bid price and assumes the risk of any unanticipated increased costs due to observable site conditions. Based on these considerations, the Hearings Officer concludes that the prebid site visit requirement provides no basis for disqualifying Petitioner from the solicitation. *Starcom Builders, Inc. v. Board of Water Supply; PCH-2003-18 (October 18, 2003).*

(3) The good, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the invitation for bids.

B. Rejection of proposals; basis; Reasons for rejection of proposals include, but are not limited to:

- (1) The offeror that submitted the proposal is nonresponsible.
- (2) The proposal ultimately, after any opportunity has passed for altering or clarifying the proposal, fails to meet the announced requirements of the agency in some material respect; or
- (3) The proposed price is clearly unreasonable.

X. PROTESTS

A. Standing to Protest; Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or designee. *HRS §103D-701(a)*.

Cases:

Standing limited to actual or prospective bidders, offerors and contractors; In order to qualify as a party with standing to file a request for an administrative hearing, the Petitioner must be an “actual or prospective bidder, offeror, or contractor” as set forth in *HRS §103D-701(a)*. *HAR §3-120-2* defines a “bidder” as a business submitting a bid in response to an invitation for bids, while an offeror is a business submitting a bid or proposal in response to an invitation for bids or a request for proposals, or an unpriced technical offer in response to an expression of interest. A contractor is defined in *HRS §103D-104* as any person having a contract with a governmental body. *Browning Ferris Industries et.al. v. County of Kauai, PCH 96-11 (January 29, 1997)*.

Standing; submission of bid prior to deadline; A person or entity which has not submitted a bid in response to an invitation for bids (or request for proposals) prior to the deadline for such submissions is neither an actual nor a prospective bidder, offeror, nor contractor, and thus has no standing to file a request for administrative hearing under *HRS Chapter 103D*. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000)*; *Hawaiian Natural Water Co. v. City & County of Honolulu, PCH 99-14 (April 25, 2000)*.

Standing to protest; taxpayers; Under the Code and its implementing rules, standing to protest is limited to actual or prospective bidders, offerors and contractors. The qualifying language in *HRS §103D-701(a)* and *HAR §3-126-1* precludes persons or entities from having standing simply as taxpayers of the State to initiate or pursue protests in such a capacity. *Hawaii Newspaper Agency, et. al v. State Dept. of Accounting & General Services et. al., and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al, PCH 99-2 and PCH 99-3 (consolidated)(April 16, 1999)*.

Standing issue may be raised sua sponte; The question of standing to bring an action may be raised *sua sponte* by Hearings Officer having jurisdiction over the case. *Hawaii Newspaper Agency, et. al, v. State Dept. of Accounting & General Services, et.al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et.al., PCH 99-2 and PCH 99-3 (consolidated)(April 16, 1999)*.

Standing; intent to submit proposal insufficient to create standing; The protestor’s stated intention to submit a proposal in response to any resolicitation, and its efforts to secure resolicitation by filing a protest, can do nothing to create the necessary interested party status. *MCI Telecommunications Corp. v. United States, 878 F.2d 362 (Fed. Cir. 1989)*, cited in *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al, PCH 99-2 and PCH 99-3 (consolidated)(April 16, 1999)*.

Standing; aggrieved party; No realistic expectation; Because Milici no longer had any realistic expectation of submitting a proposal and being awarded the contract, it was not an “aggrieved” party when the contract was subsequently awarded to RFD. *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et.al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al, PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999)*; *Construction Material Agents and Supply LLC, et al. v. State Dept. of Accounting & General Services, et al., PCH-2000-11 (September 17, 2001)*.

Person aggrieved; A “person aggrieved” has been defined as one who has been specially, personally and adversely affected by a special injury or damage to his personal property rights. *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et.al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al, PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999) citing Jordan v. Hamada, 54 Haw. 451 (1982).*

Standing; aggrieved party; realistic expectation; The rights and remedies created under HRS Chapter 103D were intended for and are available only to those who participated in or still have a realistic expectation of submitting a bid in response to the IFB. Standing to bring a protest is conferred upon any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract. *Hawaii School Bus Assn v. DOE; PCH-2003-3 (May 16, 2003).*

Aggrieved persons; defined; According to HRS §103D-701(a), only aggrieved persons have standing to protest. In order to have standing, an actual or prospective bidder, offeror or contractor must show that it has suffered, or will suffer, a direct economic injury as a result of the alleged adverse agency action. Consequently, a party is not aggrieved until official action, adverse to it, has been taken. *Eckard Brandes, Inc. v. Dept. of Finance, County of Hawaii; PCH-2003-14, PCH-2003-20 (Consolidated on remand from Third Circuit Court)(June 24, 2004).*

Aggrieved persons; official action; Respondent’s determination that there was no conflict of interest constituted an “official” action that adversely affected Petitioner and, according to the record, was the first time Petitioner had been so affected by any action or decision of Respondent. Thus, Petitioner attained “aggrieved” party status when Respondent issued its May 6, 2003 denial letter to Petitioner. *Eckard Brandes, Inc. v. Dept. of Finance, County of Hawaii; PCH-2003-14, PCH-2003-20 (Consolidated on remand from Third Circuit Court)(June 24, 2004).*

Standing; aggrieved party status; premature; Because Respondent’s denial was based on the fact that Jamile had not undertaken any of the acts complained of, the denial was not adverse to Petitioner and Petitioner was not “aggrieved” in connection with the solicitation or award of the contract and therefore lacks standing to bring this action. At the very least, this action is premature. *GMP Associates, Inc. v. Board of Water Supply, PCH-2004-11 (September 17, 2004).*

B. Time to Protest; A protest shall be filed in writing and in duplicate, five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract; provided further, that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers. *HRS §103D-701(a); HAR § 3-126-3(a).*

Cases:

Time to file protest over nonresponsive bid begins when protestor knows of government’s intent to award contract; The protest shall be submitted in writing within 5 working days after the aggrieved person knows or should have known of the facts giving rise thereto. In that regard, the basis for a protest grounded upon nonresponsiveness of another bid, in addition to the alleged nonresponsiveness itself, is the protestor’s knowledge that the government has awarded or *intends to award* the contract to the nonresponsive bidder. Prior to that time, a protest would be premature since the government could well reject the offending bid. In other words, the adverse action being protested is the government’s acceptance of the alleged nonresponsive bid, not merely the offeror’s submission of such a bid. *GTE Hawaiian Telephone Co., v. County of Maui, PCH 98-6 (December 9, 1998).*

Time to file protest; one person's knowledge not imputed to protestor; The knowledge of one person may not be imputed to the protestor as the requirement stated in HRS §103D-701(a) and HAR §3-126-3(a) refers to knowledge that the *aggrieved person* had or should have had. *Okada Trucking Company, Ltd. v. Board of Water Supply, PCH 99-11 (November 10, 1999)(rev'd on other grounds).*

Failure to provide information not an excuse for untimely filing; The State's alleged failure to provide information did not constitute a legitimate basis for the protestor's failure to comply with the time requirements for requesting an agency reconsideration or an administrative hearing. *Brewer Environmental Industries, Inc. v. County of Kauai, PCH 96-9 (November 20, 1996).*

Time constraints must be strictly adhered to; The accomplishment of the underlying objectives of the Code requires strict adherence to the time constraints for the initiation and prosecution of protests. *GTE Hawaiian Telephone Co., Inc., v. County of Maui, PCH 98-6 (December 9, 1998).*

Facsimile "filings" of protests must be completed during normal business hours; In order to be timely, documents filed in HRS Chapter 103D proceedings must be filed in the designated governmental office during the normal weekday operating hours of 7:45 a.m. to 4:30 p.m. open for the transaction of public business. The fact that a government office's machinery is operational and receives transmissions at other times is irrelevant in meeting this requirement where the filing could not have been personally served during the above hours. *GTE Hawaiian Telephone Co., Inc., vs. County of Maui, PCH 98-6 (December 9, 1998).*

Time requirement mandatory and not subject to waiver; The time requirement set forth in HAR § 3-126-3(a) is mandatory and therefore not subject to waiver by Respondent. *GTE Hawaiian Telephone Co., Inc., vs. County of Maui, PCH 98-6 (December 9, 1998).*

Person aggrieved; A "person aggrieved" has been defined as one who has been specially, personally and adversely affected by a special injury or damage to his personal property rights. *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et.al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al, PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999) citing Jordan v. Hamada, 54 Haw. 451 (1982).*

Time to file generally; The language of HAR §3-126-3 does not require that the time within which a protest must be filed is necessarily calculated from the date of an award, or the signing of a contract. In fact, subsection (b) makes it clear that timely protests may be filed well in advance of – or well subsequent to – either date, depending upon when the protestor knew or should have known about facts that provided him or her a reasonable basis for filing a protest. *Environmental Recycling of Haw. Ltd. v. County of Hawaii, PCH 95-4 (March 20, 1996).*

Incomplete protest does not toll time to file; In order to expedite the resolution of protests, HAR §3-126-3(c) requires that protests include a statement of reasons for the protest and supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time. Petitioner's initial protest letter does not contain *any* of that information. Nor is the requirement satisfied by an indirect reference to an earlier letter. The government is not required to assume or speculate as to the basis for a protest. Rather, HAR §3-126-3(c) mandates that protests shall include that information. Such a requirement is not unreasonable particularly in light of the Code's objective of expediting the resolution of protests. The time limitation for the filing of a protest is not tolled by the filing of an incomplete protest letter. Simply put, HAR §3-126-3 contemplates and requires the timely filing of a complete protest. *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998).*

Supplemental letter of protest must meet time requirement; While Petitioner's supplemental letter detailed the basis for the protest, it was filed well beyond the 5-day period of HAR §3-126-3(a). To be considered, the supplemental letter must independently meet the timeliness requirement for the filing of protests. The time limitation for filing a valid protest is not tolled by an initial incomplete filing. *GTE Hawaiian Telephone Co., Inc. v. County of Maui*, PCH 98-6 (December 9, 1998). See also, *Frank Coluccio Construction Company v. City & County of Honolulu, et al.*, PCH-2002-12 (October 18, 2002).

Legislative intent to expedite procurement process; The Recommended Regulations for the ABA's Model Procurement Code for State and Local Governments suggests a 14-day period within which to file protests rather than the shorter 5-day period provided in HAR §3-126-3(a). Also, although the Recommended Regulations in an Editorial Note suggest that "jurisdictions may wish to allow consideration of protests filed after 14 days for good cause shown, no such exception was included in HAR §3-126-3. These considerations underscore the importance the Legislature placed on the expeditious processing of protests through an efficient and effective procurement system so as to minimize the disruption to procurements and contract performance. *GTE Hawaiian Telephone Co., Inc. v. County of Maui*, PCH 98-6 (December 9, 1998).

Protest of award of contract cannot resurrect prior untimely protest; A protestor is not allowed to file a post award protest (contesting the award itself) on essentially the same factual basis – which was known to the protestor and was used by the protestor in filing an earlier (pre-award) protest. Rather, the requirement that protests be filed within 5 working days after the protestor knows or should have known of the facts leading to the filing of the protest is still controlling. Thus, the subsequent awarding of the contract, in and of itself, does not provide an independent basis for the filing of a second protest and cannot resurrect an untimely protest. *GTE Hawaiian Telephone Co., Inc. v. County of Maui*, PCH 98-6 (December 9, 1998).

Filing of duplicate copies of protest is directory in nature; The requirement in HAR §3-126-3(a) which states that protests shall be filed in duplicate is directory rather than mandatory. While the word "shall" is generally regarded as mandatory, in certain situations, it may be given a directory meaning. In analogous situations, courts have looked to the essence of the particular requirement and, where no substantial rights depend on strict compliance, have considered the requirement to be director in nature. *Big Island Recycling & Rubbish v. County of Hawaii*, PCH 99-12 (December 17, 1999); *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

Protests based on content of solicitation; generally; The amendment was obviously designed to provide governmental agencies with the opportunity to correct deficiencies in the bid documents early in the solicitation process in order to "minimize the disruption to procurements and contract performance". The possibility of having to reject all bids, cancel the solicitation and resolicit may be avoided by requiring the correction of such deficiencies prior to the bid submission date. *Clinical Laboratories of Hawaii v. City & County of Honolulu, Dept. of Budget & Fiscal Services*; PCH 2000-8 (October 17, 2000).

Strict compliance with time constraints required; Strict, rather than substantial compliance with the time constraints set forth in HRS §103D-701(a) is required in order to effectuate the statute's underlying purpose. *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget & Fiscal Services*, PCH 2000-8 (October 17, 2000).

Protest filed 14 days after bid submission is untimely; The filing of a protest 14 days after the bids were submitted defeats the very purpose for which the statute was intended. *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget & Fiscal Services*, PCH 2000-8 (October 17, 2000).

Absence of Certification of Partial Funding; Absent a certification of partial funding, the evidence was insufficient to conclude that the protestor knew or should have known that the City nevertheless intended to award a partially-funded contract for the entire project. *Frank Coluccio Construction Company v. City & County of Honolulu, et al.*, PCH 2002-7 (August 2, 2002).

Protest Based Upon Content of Solicitation; HRS §103D-701 requires that a protest based on the content of the solicitation be submitted prior to the date set for the receipt of offers. This presumes that the protestor will have sufficient knowledge of the contents of the bid documents soon after its issuance and provides governmental agencies with the opportunity to correct deficiencies in those documents early in the process in order to minimize disruption to procurements and contract performance. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Protest Based Upon Content of Solicitation; information outside documents; Because the protest was based in part on information that was not included in the bid documents, the protest was not a protest based upon the content of the solicitation. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002); MGD Technologies, Inc. v. City & County of Honolulu; PCH-2003-8 (June 20, 2003).*

Time for Filing Protest; Posting of Award; HRS §103D-701(a), as amended, requires that protests of an award or proposed award shall in any event be submitted within five working days after the posting of the award. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-18 (February 13, 2003).*

Untimely protest; equitable estoppel; Equitable estoppel may be applied against governmental agencies to prevent manifest injustice. However, the doctrine should be applied only when the failure to do so would operate to defeat a right legally and rightfully obtained-it cannot create a right; nor can it operate to relieve one from the mandatory operation of a statute. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-18 (February 13, 2003).*

Untimely protest; equitable estoppel inapplicable; The application of equitable estoppel would frustrate the policy underlying HRS §103D-701(a) by relieving the protestor from the clear and unambiguous time limitation set forth in that section. Accordingly, equitable estoppel is inapplicable under the circumstances presented in this case. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-18 (February 13, 2003).*

Untimely protest; fraudulent concealment; The application of HRS §657-20 (fraudulent concealment) is limited to HRS Chapter 663 actions. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-18 (February 13, 2003).*

Untimely protest; HAR §3-126-4(a) invalid; As rules and regulations may not enlarge, alter, or restrict the provisions of the act being administered, the conflict between HRS §103D-701(a)(requiring protests to be filed within 5 working days after protestor knew or should have known of basis for protest) and HAR §3-126-4(a)(permitting protests to be filed prior to the expiration of five working days after the posting of the notice of award) must be resolved in favor of HRS §103D-701(a). *Eckard Brandes, Inc. v. Dept. of Finance, County of Hawaii; PCH-2003-14 (July 15, 2003).*

Untimely protest; content of solicitation; Petitioner's "latent ambiguity" claim is a protest based upon the content of the IFB and as such, Petitioner was required to have filed a protest with Respondent prior to the date set for receipt of offers. *Akal Security, Inc. v. Dept. of Transportation; PCH-2004-10 (August 23, 2004).*

C. Subject of Protest; Protestors may file a protest on any phase of the solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer. *HAR §3-126-3(b).*

Cases:

Filing of second protest based upon the “award” of contract cannot resurrect untimely protest; A protestor is not allowed to file a post award protest (contesting the award itself) on essentially the same factual basis – which was known to the protestor and was used by the protestor in filing an earlier (pre-award) protest. Rather, the requirement that protests be filed within 5 working days after the protestor knows or should have known of the facts leading to the filing of the protest is still controlling. Thus, the subsequent awarding of the contract, in and of itself, does not provide an independent basis for the filing of a second protest and cannot resurrect an untimely protest. *GTE Hawaiian Telephone Co., Inc. v. County of Maui*, PCH 98-6 (December 9, 1998). See also, *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001)(filing of second protest unnecessary).

Breach of contract claim not properly before Hearings Officer; Construing the foregoing provisions with reference to each other leads to the obvious conclusion that the legislature intended to limit the authority of the Hearings Officer to review claims arising directly from the solicitation process while reserving exclusively to the courts the power to preside over contract disputes. *Roberts Hawaii School Bus, Inc. v. DOE*; PCH-2003-25 ().

Solicitation process; Solicitation process includes but is not limited to specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer. *Roberts Hawaii School Bus, Inc. v. DOE*; PCH-2003-25 ().

D. Content of Protest; The written protest shall include as a minimum the following:

- (1) The name and address of the protestor;
- (2) Appropriate identification of the procurement, and, if a contract has been awarded, the contract number;
- (3) A statement of reasons for the protest; and
- (4) Supporting exhibits, evidence, or documents available within the filing time in which case the expected availability date shall be indicated.

HAR §3-126-3(c).

Cases:

Content of protest; directory in nature; The requirement in HAR §3-126-3(c) which states that protests shall include supporting exhibits, evidence, or documents appears to be one which was promulgated with a view to the proper and orderly conduct of business concerning convenience rather than substance and therefore can be regarded as directory. This is particularly true where the protest has included a sufficient statement of the reason underlying it, and there has been a refusal by the effected agency to release such materials for inclusion in the protest. *Big Island Recycling & Rubbish v. County of Hawaii*, PCH 99-12 (December 17, 1999).

Protest must place agency on notice of filing of protest; At minimum, a protest must place the procuring agency on notice of the filing of a protest. Such notice is obviously necessary before the agency can take steps to resolve the protest or issue a decision upholding or denying the protest. Additionally, adequate notice of a protest is a prerequisite to the application of the stay. *Frank Coluccio Construction Company v. City & County of Honolulu, et al.*, PCH-2002-12 (October 18, 2002).

E. Authority to Resolve Protest; The chief procurement officer or designee, prior to the commencement of an administrative proceeding or an action in court may settle and resolve a protest concerning the solicitation or award of a contract. *HRS §103D-701(b)*.

Cases:

Governmental agencies; limited jurisdiction; Administrative agencies are tribunals of limited jurisdiction. Generally, they only have adjudicatory jurisdiction conferred on them by statute. Their jurisdiction is dependent entirely upon the validity and the terms of the statute reposing power in them. *Roberts Hawaii School Bus, Inc. v. DOE; PCH-2003-25* (); *Stoneridge Recoveries, LLC v. City and County of Honolulu; PCH-2003-5* (June 26, 2003); *2 Am Jur 2d Administrative Law, §275* (2nd Edition).

F. Agency Decision; If the protest is not resolved by mutual agreement, the chief procurement officer or designee shall promptly issue a decision in writing to uphold or deny the protest. The decision shall:

- (1) State the reasons for the action taken; and
- (2) Inform the protestor of the protestor's rights to review.

HRS §103D-701(c)

Cases:

Failure to properly inform protestor of its rights to review; estoppel; Respondent's violation of *HRS §103D-701(c)* may have been a basis for estopping Respondent from claiming that Petitioner's request for administrative review was untimely. *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

Failure to properly inform protestor of the time for appeal; The decision by Chief Procurement Officer must notify the protestor of the correct time limitations under *HRS §103D-712(a)*. Where the decision erroneously states that the time for appeal is seven days from the date of receipt of the written decision when the statute provides that the time for appeal is for seven days from the date of the issuance of the decision, the decision failed to comply with *HRS §103D-701(c)(2)*. *Matt's Transmission Repair, Inc. v. Department of Budget & Fiscal Services, et al., Civil No. 01-1-3242-11; 01-1-3309 (Consolidated)*(First Circuit Court, 5/28/02).

Failure to properly inform protestor of the time for appeal; Where the decision erroneously states that the time for appeal is seven days from the date of receipt of the written decision rather than seven days from the issuance of the decision, a protest filed within the time provided in the decision is nevertheless timely. *Matt's Transmission Repair, Inc. v. Department of Budget & Fiscal Services, et al., Civil No. 01-1-3242-11; 01-1-3309 (Consolidated)*(First Circuit Court, 5/28/02).

Failure to properly inform protestor of the time for appeal; denial of due process; Where the decision erroneously states that the time for appeal is seven days from the date of receipt of the written decision rather than seven days from the issuance of the decision, a protest filed more than seven days after the issuance of the decision but within the time provided in the decision would constitute a denial of the appellant's right to due process. *Matt's Transmission Repair, Inc. v. Department of Budget & Fiscal Services, et al., Civil No. 01-1-3242-11; 01-1-3309 (Consolidated)*(First Circuit Court, 5/28/02).

G. Decision Mailed to Protestor; A copy of the decision shall be mailed or otherwise furnished immediately to the protestor and any other party intervening. *HRS §103D-701(d)*.

H. Stay; In the event of a *timely* protest, no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State. *HRS §103D-701(f)*; *HAR §3-126-5* (states “no award”).

Cases:

Violation of stay; The award of a contract notwithstanding the fact that a timely protest had been received and no written determination had been made by agency that the award of the contract without delay was necessary to protect the substantial interests of the State, violates the provisions of *HRS §103D-701(f)*. Because the award of a contract so severely limits the relief available *HRS §103D-701(f)* requires that a timely protest halt solicitation and contracting activities until the protest is resolved. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431 (1997)*.

Violation of stay; The contract was awarded to KTW notwithstanding the fact that a timely protest had been received and no written determination had been made by Respondent that the award of the contract without delay was necessary to protect the substantial interests of the State. The record is completely devoid of any such “substantial interest” determination that would arguably meet the requirements of *HRS §103D-701(f)*. Thus, the award of the contract to KTW violated the stay. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998)*.

Head of purchasing agency chargeable with knowledge of applicable regulations; reliance solely on HRS §103D-701 insufficient to make execution of contract reasonable in face of stay provision; By virtue as head of a purchasing agency with authority to enter contracts, Kane is certainly chargeable with knowledge of the regulations applicable to public procurement. Thus, Kane’s reliance on *HRS §103D-701* was insufficient to make his execution of the contract, notwithstanding the stay provision, reasonable. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431 (1997)*.

Merits of protest irrelevant to substantial interest determination; Consideration of the merits of the protest has no place in the “substantial interest” determination required by *HRS §103D-701(f)*. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431 (1997)*.

Substantial interest determination must specify State’s interest; A “substantial interest” determination must specifically identify the State interests involved and articulate why it is necessary for the protection of those interests that the contract be awarded without delay. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431 (1997)*.

Stay provision applies to all activities relating to procurement. *In re Carl* makes clear that all activities relating to the procurement, including activities relating to the solicitation, contract and performance of the contract must immediately cease once a timely protest has been received, notwithstanding the delivery of the contract and a notice of award letter. *Jas. W. Glover, Ltd. v. Board of Water Supply (August 7, 2001)*.

Processing of contract violated stay. City violated *HRS §103D-701(f)* when it continued to process the contract for final execution notwithstanding the timely filing of a protest. *Jas. W. Glover, Ltd. v. Board of Water Supply (August 7, 2001)*.

Substantial interest determination; requirements; A determination that substantial State interests were “involved” is not sufficient under the plain language of *HRS §103D-701(f)*, to allow the agency to proceed with the contract despite the protest. Not only must substantial State interests be “involved”, but the delay required to resolve the solicitation protest must threaten to impair those interests such that award of the contract without delay is necessary to protect them. *Carl Corp. v. DOE; 946 P.2d 1 (1997)*.

Stay; general rule; The general rule established by HRS §103D-701(f) is that a timely protest halts solicitation and contract activities until the protest is resolved. By maintaining the status quo during the pendency of a protest, violations of the procurement Code can be rectified before the work on the contract has proceeded so far that effective remedies, for the protestor and the public, are precluded by expense and impracticality. *Carl Corp. v. DOE; 946 P.2d 1 (1997).*

Substantial interest determination; delay normally minimal; Because the Code shortens deadlines for filing protests and applications for review and expedites the administrative hearings process, the delay contemplated is minimal, generally a few months. *Carl Corp. v. DOE; 946 P.2d 1 (1997).*

Substantial interest determination; essential state functions; There are situations where a delay of several months before a contract may be awarded would have serious repercussions on the continuation of essential State functions. It is in these situations that the solicitation or award is allowed to proceed, upon a written determination that “the award of the contract without delay is necessary to protect the substantial interests of the State.” As the commentary to the ABA Model Code §9-101, which is substantially identical to HRS §103D-701(f), explains: “In general, the filing of a protest should halt the procurement until the controversy is resolved. In order to allow essential governmental functions to continue, Subsection (6) provides that the [State] may proceed with the solicitation or award of the contract, despite the protest, upon a determination in writing by the Chief Procurement Officer or the head of the Purchasing Agency that such action is necessary. It is expected that such a determination will occur only in those few circumstances where it is necessary to protect a substantial interest of the [State].” *Carl Corp. v. DOE; 946 P.2d 1 (1997).*

Substantial interest determination; burden of proof; The bidder met its burden of proving by a preponderance of the evidence that continued performance on the contract pending resolution of the protest was not necessary to protect substantial State interests. *Carl Corp. v. DOE; 946 P.2d 1 (1997).*

Substantial interest not established; The record shows by a preponderance of the evidence that performance of the contract without delay was not necessary to maintain library automation services. A library official testified that DRA would continue to support the agency on a month-to-month extension agreement and that the maintenance support contract with DRA renews automatically from year to year if both parties agree to all the terms and that DRA was willing to continue providing services under its contract until the protest was resolved and a new vendor commenced providing services. Therefore, although the State may have a substantial interest in continuing library automation services, award of the contract to Ameritech without delay was not necessary to protect that interest and Carl proved as much by a preponderance of the evidence. *Carl Corp. v. DOE; 946 P.2d 1 (1997).*

Substantial interest not established; The savings that would be realized by motorists in having a vehicle storage lot within the zone; the disruption that would result from having to transfer the towing duties back to Petitioner; and a preference for distributing the towing services contract to other vendors are not “substantial government interest.” Moreover, the fact that the substantial interest determination was not made until some eleven days after the protest had been filed also belies the City’s characterization of those interests as substantial. *Stoneridge Recoveries, LLC v. City and County of Honolulu, PCH-2004-3 (March 19, 2004).*

Substantial interest established; The City’s need for towing services in the zone is a substantial interest where the evidence established that such services were required to remove vehicles that are involved in accidents, obstruct driveways, block fire hydrants, and otherwise pose public safety hazards. *Stoneridge Recoveries, LLC v. City and County of Honolulu, PCH-2004-3 (March 19, 2004).*

Stay applies to contract performance; In discussing the stay and the remedies available under the Procurement Code, the *Carl* Court held that a timely protest halts solicitation and *contract activities* until the protest is resolved, and “*the further performance on the contract has proceeded*, the more likely it is, given the applicable factors, that ratification of the contract is ‘in the best interests of the State,’ effectively eliminating any remedy, either to the public or the protestor, from an illegally entered contract.” The Court’s comments make clear that the stay applies to, and requires the halting of, any further performance on the contract. *Stoneridge Recoveries, LLC v. City and County of Honolulu, PCH-2004-3 (March 19, 2004)*.

Stay not applicable to contract unrelated to solicitation; The imposition of the stay does not entitle Petitioner to the contract since the stay only affects the emergency procurement, award and contract to Oahu Auto. It does not affect the towing services agreement between Petitioner and Respondent which expired after March 5, 2004. *Stoneridge Recoveries, LLC v. City and County of Honolulu, PCH-2004-3 (March 19, 2004)*.

Violation of Stay; Basis for sanctions; Under the Code as presently written, a violation of the stay does not present an independent basis for the imposition of sanctions. Where the agency violates the stay but the protestor is unable to prove that (1) the solicitation itself was in violation of the code and that (2) the agency’s actions in awarding the contract amounted to bad faith, the Hearings Officer is powerless to impose sanctions for the violation and award attorney’s fees. *Jas. W. Glover, Ltd. v. Board of Water Supply (August 7, 2001)*.

I. Costs; In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid or proposal preparation costs *but no attorney’s fees*. *HRS §103D-701(g); HAR §3-126-7(b)*.

J. Request for Reconsideration; *HAR §3-126-8*.

(1) Who May File - Reconsideration of a decision of the chief procurement officer may be requested by the protestor, appellant, any interested party who submitted comments during consideration of the protest, or any agency involved in the protest.

(2) When Filed – Requests for reconsideration shall be filed not later than ten (10) working days after receipt of such decision.

(3) Notice to State - The protesting bidder or offeror shall inform the State within five (5) working days after the final decision if an administrative appeal will be filed. An appeal shall be filed within seven (7) calendar days of the determination. *HAR §3-126-8(e)*.

Cases:

Untimely request for reconsideration does not restart time to appeal; A Petitioner’s untimely filing of a motion for reconsideration – regardless of how it may have been handled by the agency – did not restart the clock for calculating the time to file a request for an administrative review under *HRS §103D-712(a)*. *Brewer Environmental Industries, Inc. v. County of Kauai, PCH 96-9 (November 20, 1996)*.

Validity of rule providing for reconsideration; HAR §3-126-8 may be either an appropriate rule for clarifying and enhancing the implementation of HRS Chapter 103D, or an invalid rule which “violates constitutional or statutory provisions, or exceeds the statutory authority of the agency as expressed by the legislature in enacting that chapter. *RCI Environmental, Inc. v. State Dept. of Land and Natural Resources, PCH 2000-10 (January 2, 2001).*

Reconsideration rule counterproductive to purpose of Code; It would seem that the reconsideration process may actually be counterproductive to the expressed purpose(s) of the Hawaii Public Procurement Code. *RCI Environmental, Inc. v. State Dept. of Land and Natural Resources, PCH 2000-10 (January 2, 2001).*

Reconsideration rule appears to be invalid; The promulgation of HAR §3-126-8 might have been appropriate if the ten working days allowed for requesting a reconsideration under subsection (b) had been less, instead of more, than the seven calendar days allowed for requesting an administrative hearing under subsection (e). Nevertheless, such is not the situation here, where the effect of the rule is to extend – more or less indefinitely – the statutory time limitations on actions prescribed in HRS §103D-712. Thus, it appears that HAR §3-126-8 is invalid because it exceeds the statutory authority of the procurement policy board and the Petitioner’s request for an administrative hearing should actually have been made in accordance with the requirements of HRS §103D-712 (ie within seven calendar days of Respondent’s decision denying the Petitioner’s protest). *RCI Environmental, Inc. v. State Dept. of Land and Natural Resources, PCH 2000-10 (January 2, 2001).*

XI. ADMINISTRATIVE REVIEW

A. Jurisdiction of Hearings Officers; Hearings Officer shall have jurisdiction to review and determine de novo any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer. *HRS §103D-709(a)*.

Cases:

De novo determination; The provisions of HRS §103D-709(a) extend jurisdiction to the Hearings Officer to review de novo the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer, made pursuant to HRS §§103D-310, 103D-701 or 103D-702. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997); *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation*, PCH 2000-4 (June 8, 2000); *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001); *Phillip G. Kuchler, Inc. v. DOT*; PCH-2003-21 ().

Jurisdiction of administrative agency. An administrative agency may always determine questions about its own jurisdiction. *Carl. Corp. v. State*, 93 Haw. 155 (2000).

No jurisdiction over concession contract; A petition for an administrative hearing to contest the award of a concession contract which was solicited/awarded by an agency pursuant to the provisions of HRS Chapter 102 (Concessions on Public Property) does not fall within the jurisdictional authority of DCCA Hearings Officers as set out in HRS Chapter 103D. The term “concession” (as defined in HRS §102-1) focuses on an agency’s granting a privilege to conduct certain operations, while the term, “procurement” (as defined in HRS §103D-104) focuses on the agency acquiring goods, services or construction. *Elite Transportation Co., Inc. v. State Dept. of Transportation*, PCH 96-2 (May 21, 1997).

No jurisdiction to review exemption determination; HRS §103D-102(b) precluded administrative review of chief procurement officer’s determination that contract was exempt from requirements of Code. Therefore, Hearings Officer correctly concluded that he did not have jurisdiction to review chief procurement officer’s determination that interim contract was exempt from requirements of code. *Carl. Corp. v. State*, 93 Haw. 155 (2000).

Termination of contract renders moot question of whether contract should be ratified; Hearings Officer was not required to consider best interest of State in accepting parties’ termination of contract, and Hearings Officer properly found that contracting agency’s termination of contract rendered moot the determination of whether contract should be terminated or ratified. *Carl. Corp. v. State*, 93 Haw. 155 (2000).

Termination of Hearings Officer’s jurisdiction upon issuance of decision; The Code requires Hearings Officers to expeditiously issue a decision on a request for review made pursuant to HRS §103D-709 that disposes of the underlying protest. When issued, that decision is final and conclusive and constitutes a final adjudication of the merits of the protest. The issuance of that decision also terminates the Hearings Officer’s jurisdiction over the request for review. *Frank Coluccio Construction Company v. City & County of Honolulu, et al.*, PCH-2002-12 (October 18, 2002).

No jurisdiction over protest once decision issued; reliance on earlier protest inappropriate; Petitioner cannot rely on its protest in PCH-2002-7 to establish the Hearings Officer’s jurisdiction over its September 27, 2002 request for review since that protest was fully adjudicated in the earlier action. *Frank Coluccio Construction Company v. City & County of Honolulu, et al.*, PCH-2002-12 (October 18, 2002).

Governmental agencies; limited jurisdiction; Administrative agencies are tribunals of limited jurisdiction. Generally, they only have adjudicatory jurisdiction conferred on them by statute. Their jurisdiction is dependent entirely upon the validity and the terms of the statute reposing power in them. *Roberts Hawaii School Bus, Inc. v. DOE*; PCH-2003-25 (2003); *Stoneridge Recoveries, LLC v. City and County of Honolulu*; PCH-2003-5 (June 26, 2003); 2 Am Jur 2d Administrative Law, §275 (2nd Edition).

B. Powers of Hearings Officers; Hearings Officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision which shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the supreme court. *HRS §103D-709(b)*.

Cases:

Hearings Officer's decision final and conclusive; The Code directs the Hearings Officer to expeditiously issue a decision that disposes of the underlying protest. When issued, that decision is final and conclusive and constitutes a final adjudication of the merits of the protest. *Frank Coluccio Construction Company v. City & County of Honolulu, et al.*, PCH-2002-12 (October 18, 2002).

Jurisdiction following issuance of decision; reconsideration of decision; Neither HRS Chapter 103D nor its implementing rules provide the Hearings Officer with the authority to retain jurisdiction over a matter after a request for review has been decided. There is no provision in either HRS Chapter 103D or its implementing rules that allow aggrieved party to seek reconsideration of the Hearings Officer's decision. *Frank Coluccio Construction Company v. City & County of Honolulu, et al.*, PCH-2002-12 (October 18, 2002).

C. Authority of Hearings Officers; Hearings Officers shall decide whether the determinations of the chief procurement officer were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. *HRS §103D-709(f)*.

Cases:

Authority; generally; In reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accord with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. *Okada Trucking Co., Ltd. v. Board of Water Supply et. al*, PCH 99-11 (November 10, 1999) (rev'd on other grounds); *Hawaiian Dredging Construction Co. v. City & County of Honolulu*, PCH 99-6 (August 9, 1999); *Hawaii Newspaper Agency, et. al, v. State Dept. of Accounting & General Services, and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services*, PCH 99-2 and PCH 99-3 (consolidated)(April 16, 1999); *GTE Hawaiian Telephone Co., Inc. v. County of Maui*, PCH 98-6 (December 9, 1998); *Environmental Recycling v. County of Hawaii*, PCH 98-1 (July 2, 1998); and *Standard Electric, Inc. v. City & County of Honolulu, et. al*, PCH 97-7 (January 2, 1998).

Hearings Officer has authority to act in same manner as contracting officials; In reviewing the determinations of the contracting officials, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997).

Authority to ratify or terminate contract; Hearings Officer had authority only to decide whether to ratify or terminate contract, and did not have authority to dictate the method or manner of contract termination. *Carl Corp. v. State*, 93 Haw. 155 (2000).

Authority to review determinations of chief procurement officer. The written decision that the Department of Commerce and Consumer Affairs Hearings Officer has the authority to make under HRS §103D-709 is whether the determinations of the chief procurement officer are in accordance with the Constitution, statutes, and regulations. HRS §103D-709(f).

Impartiality of Hearings Officers; Rulings that are in the opposing party's favor do not equal a lack of impartiality. *Southern Food Group, L.P. v. Dept. of Educ., et.al.*, 89 Haw. 443 (1999).

Hearings Officer's scope of review; limited to issues raised in protest; In light of HRS §103D-709(f), in order for the Hearings Officer to review Petitioner's claims, Petitioner must have first raised those issues in a timely bid protest to the agency. Because Petitioner's protest did not identify these issues to Respondent, the Hearings Officer concludes that Petitioner is barred from raising these issues in the administrative proceedings. *Akal Security, Inc. v. Dept. of Transportation; PCH-2004-10* (August 23, 2004).

D. Standing to request administrative review; Only parties to the protest may initiate an administrative review. HRS §103D-709(c).

Cases:

Standing issue may be raised sua sponte; The question of standing to bring an action may be raised sua sponte by the Hearings Officer having jurisdiction over the case. *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et.al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, PCH 99-2 and PCH 99-3 (consolidated)*(April 16, 1999).

Intent to submit proposal insufficient to create standing; The protestor's stated intention to submit a proposal in response to any resolicitation, and its efforts to secure resolicitation by filing a protest, can do nothing to create the necessary interested party status. *MCI Telecommunications Corp. v. United States*, 878 F.2d 362 (Fed. Cir. 1989), cited in *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et. al and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al, PCH 99-2 and PCH 99-3 (consolidated)*(April 16, 1999).

Standing; aggrieved party; Because Milici no longer had any realistic expectation of submitting a proposal and being awarded the contract, it was not an "aggrieved" party when the contract was subsequently awarded to RFD. *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, PCH 99-2 and PCH 99-3(consolidated)*(April 16, 1999).

E. Time/Place to File; Requests for administrative review shall be made within seven (7) calendar days of the *issuance of a written determination* directly to the Office of Administrative Hearings. HRS §103D-712(a).

Cases:

Time to file; from issuance of written determination; The mandatory language in HRS §103D-712(a) specifies that requests for administrative review be made within seven calendar days of the *issuance* of a written determination rather than specifying either the date of mailing or date of receipt to be the time from which the seven calendar days begin to run. *Nehi Lewa Inc. v. City & County of Honolulu, PCH 99-13* (December 17, 1999).

Issuance of written determination; date of mailing; “Issuance” in Public Procurement Code statute allowing for administrative review if made “within seven calendar days of the issuance of a written determination” by purchasing agency means the date of mailing, as evidenced by the postmark date, rather than receipt of the mailing. *Nihi Lewa, Inc. v. Dept. of Budget & Fiscal Services*; 103 Haw. 163 (2003). *Aloha Tool & Rental, Inc. v. Department of Budget & Fiscal Services*; PCH-2004-13 (September 15, 2004).

Request for administrative review filed with purchasing agency untimely; Bidder failed to file request for review within seven days of issuance of final determination and thus request was untimely, where request was hand-delivered to purchasing agency rather than hearings office prior to the seventh day after issuance and request was only delivered to hearings office two days after deadline. *Nihi Lewa Inc. v. Dept. of Budget & Fiscal Services*; PCH-99-13 (December 17, 1999).

Time to file; generally; Both HRS §103D-712 and HAR §3-126-8(e) require that a request for administrative review be made within seven calendar days of the issuance of a written determination [under HRS §§103D-310, 103D-701, or 103D-702]. A failure to comply with this mandatory time requirement precludes the pursuit of an administrative hearing. *Soderholm Sales and Leasing, Inc. v. County of Kauai*, PCH-99-4 (March 9, 1999).

Timeliness requirement jurisdictional in nature; It is worth noting that the statutory language of HRS §103D-712(a) differs in significant respects from the regulatory language in HAR §3-126-3. This statute does establish a particular date (the issuance of a written determination) from which to calculate the seven calendar days within which a request for administrative review must be made. Furthermore, the mandatory language of this provision is jurisdictional in nature and, unlike a failure to comply with HAR §3-126-3, precludes an untimely protestor from pursuing an administrative hearing. *Environmental Recycling of Hawaii, Ltd. v. County of Hawaii*, PCH 95-4 (March 20, 1996); *Brewer Environmental Industries, Inc. v. County of Kauai*, PCH 96-9 (November 20, 1996).

Timeliness requirement jurisdictional in nature; no waiver; The jurisdictional provisions of HRS §103D-712 (relating to the timeliness of a request for an administrative hearing) are mandatory in nature and cannot be waived by a party. *Environmental Recycling of Hawaii, Ltd. v. County of Hawaii*, PCH 95-4 (March 20, 1996).

Place to file; directly with DCCA; The mandatory language in HRS §103D-712(a)(as amended) specifies that requests for administrative review hearings shall be made directly to the office of administrative hearings. This statutory requirement can neither be enlarged nor diminished by the independent receipt, and transmittal, of such a request by another office of a county or state government. *Nihi Lewa Inc. v. City & County of Honolulu*, PCH 99-13 (December 17, 1999).

Notification of administrative appeal; The provision within HAR §3-126-8(e) which states that a protestor shall inform the state within five working days after the final decision if an administrative appeal will be filed is fulfilled when such notification is given to the agency which has taken the action being protested so long as the agency would fall within the very broad definition of state as set out in HAR §3-120-2. *Solderholm Sales and Leasing, Inc. v. County of Kauai*, PCH 99-4 (March 9, 1999).

HAR §3-126-49 inapplicable; While HAR §3-126-49 has general applicability to time sensitive requirements within the Code, its purpose is to further define the generic use of the term “days” where that term is not further defined within the statute or rule where it appears. Significantly, HAR §3-126-49 begins with the limiting language that it applies “Unless otherwise provided by statute or rule . . .” And HAR §3-126-8(e) does provide otherwise – by specifically stating that requests for administrative review shall be made “within seven calendar days.” *RCI Environmental, Inc. v. State Dept. of Land and Natural Resources*, PCH 2000-10 (January 2, 2001); *Eckard Brandes, Inc. v. Dept. of Finance, County of Hawaii*; PCH-2003-14 (July 15, 2003); *Maui Auto Wrecking v. Dept. of Finance*, PCH-2004-15 ().

Petitioner's reliance on Respondent's incorrect letter does not remedy late filing; Petitioner's reliance on a portion of Respondent's letter incorrectly stating that the time for filing such a request as within seven calendar days after receipt of the decision does not remedy the late filing. While that letter might or might not constitute a basis for some other action, its content is not cognizable as a basis for this forum to do otherwise than correctly apply the correct law. *RCI Environmental, Inc. v. State Dept. of Land and Natural Resources, PCH 2000-10 (January 2, 2001).*

Time for filing commences upon issuance of decision; The statute identifies the operative event as "the issuance of a written determination" and the rule is in accord by also focusing on the "determination" as the operative event. In addition, it has been consistently held that the term, "date of issuance" is distinguishable from the terms "date of receipt" (although it is possible that under a given set of circumstances both could refer to the same calendar date), and that compliance with the provisions of the statute and/or rule is mandatory – with the result that a failure to make a timely filing deprives this forum of jurisdiction to conduct further proceedings. *RCI Environmental, Inc. v. State Dept. of Land and Natural Resources, PCH 2000-10 (January 2, 2001).* See also, *Matt's Transmission Repair, Inc. v. City & County of Honolulu, et al., PCH-2001-6 (October 29, 2001).*

Failure to properly inform protestor of its rights to review; estoppel; Respondent's violation of HRS §103D-701(c) may have been a basis for estopping Respondent from claiming that Petitioner's request for administrative review was untimely. *Jas. W. Glover, Ltd. v. Board of Water Supply (August 7, 2001).*

Failure to properly inform protestor of the time for appeal; The decision by Chief Procurement Officer must notify the protestor of the correct time limitations under HRS §103D-712(a). Where the decision erroneously states that the time for appeal is seven days from the date of receipt of the written decision when the statute provides that the time for appeal is for seven days from the date of the issuance of the decision, the decision failed to comply with HRS §103D-701(c)(2). *Matt's Transmission Repair, Inc. v. Department of Budget & Fiscal Services, et al., Civil No. 01-1-3242-11; 01-1-3309 (Consolidated)(First Circuit Court, 5/28/02).*

Failure to properly inform protestor of the time for appeal; Where the decision erroneously states that the time for appeal is seven days from the date of receipt of the written decision rather than seven days from the issuance of the decision, a protest filed within the time provided in the decision is nevertheless timely. *Matt's Transmission Repair, Inc. v. Department of Budget & Fiscal Services, et al., Civil No. 01-1-3242-11; 01-1-3309 (Consolidated)(First Circuit Court, 5/28/02).*

Failure to properly inform protestor of the time for appeal; denial of due process; Where the decision erroneously states that the time for appeal is seven days from the date of receipt of the written decision rather than seven days from the issuance of the decision, a protest filed more than seven days after the issuance of the decision but within the time provided in the decision would constitute a denial of the appellant's right to due process. *Matt's Transmission Repair, Inc. v. Department of Budget & Fiscal Services, et al., Civil No. 01-1-3242-11; 01-1-3309 (Consolidated)(First Circuit Court, 5/28/02).*

Failure to timely appeal; time to appeal commences upon mailing of decision; HRS §103D-712(a) requires that a request for administrative review be made within seven calendar days after the decision is mailed. *Stoneridge Recoveries, LLC v. City & County of Honolulu, PCH 2002-11 (September 23, 2002).*

Time to appeal; postmarked date may raise factual issue; a material factual issue may arise where the protestor can show that the decision was postmarked well after the alleged mailing date. *Stoneridge Recoveries, LLC v. City & County of Honolulu, PCH 2002-11 (September 23, 2002).*

Failure to protest prior to requesting administrative review; estoppel; Respondent is estopped from claiming that the DCCA lacks jurisdiction to hear this matter as Petitioner's failure to first protest was the direct result of Respondent's erroneous instruction to file a complaint with the DCCA rather than to file a protest. *Harry Marx Chevrolet/Cadillac v. Maui County; PCH-2002-19 (March 17, 2003).*

Timely appeal; protester's responsibility; Petitioner was responsible to ensure that its request for review was filed with OAH in a timely manner. *Apex Software, Inc. v. State Procurement Office*; PCH-2003-29 (July 8, 2004).

Timely appeal; made directly to DCCA; Request for hearing sent to the Respondent who then transmitted request to DCCA did not meet the requirements of HRS §103D-712 and did not confer jurisdiction on DCCA. *Superior Protection, Inc. v. Department of Transportation*; PCH-2004-12 (August 18, 2004).

Timely appeal; facsimile transmission; There is no authority to support the contention that the filing of a request for administrative review by facsimile transmission to the DCCA is acceptable. Requests for hearing received by facsimile transmission are considered to be courtesy copies and no action is taken by DCCA unless and until an original is received. *Superior Protection, Inc. v. Department of Transportation*; PCH-2004-12 (August 18, 2004).

Requirement that request for administrative review be received by DCCA within prescribed time; Pursuant to HRS §103D-712(a), requests for administrative review must be received by OAH as evidenced by the file-stamp date, within the prescribed 7 calendar day period. *Maui Auto Wrecking v. Dept. of Finance*, PCH-2004-15 ().

F. Time for Hearing; Hearings shall commence within twenty-one (21) calendar days of receipt of the request. *HRS §103D-709(b)*.

G. Burden of Proof; The party initiating the proceeding shall have the burden of proof. The degree of proof shall be a preponderance of the evidence. The rules of evidence shall be strictly adhered to. *HRS §103D-709(c)*.

Cases:

Burden of proof; generally; In addressing the burden of proof for administrative proceedings, HRS §103D-709(c) and HAR §3-126-56(c) state that the party initiating the proceeding (Petitioner) must establish its claim by a preponderance of the evidence. *Island Recycling, Inc. v. City & County of Honolulu*, PCH 99-5 (April 15, 1999); *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation*, PCH 98-2 (May 19, 1998); *PRC Public Sector, Inc. v. County of Hawaii*, PCH 96-3 (May 31, 1996); *The Systemcenter, Inc. v. State Dept. of Transportation*, PCH 98-9 (December 10, 1998).

Burden of proof; As the party initiating this action, Petitioner has the burden of proof. *Stoneridge Recoveries, LLC v. City and County of Honolulu*; PCH-2003-5 (June 26, 2003).

H. Record; The Hearings Officers shall ensure that a record of each proceeding which includes the following is compiled:

- (1) All pleadings, motions, intermediate rulings;
- (2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;
- (3) Offers of proof and rulings thereon;
- (4) Proposed findings of fact;

- (5) A recording of the proceeding which may be transcribed if judicial review of the written decision is sought.

HRS §103D-709(d).

I. Stay of Proceedings; No action shall be taken on a solicitation or award of a contract while a proceeding is pending, if the procurement was previously stayed as a result of the filing of a timely protest. HRS §103D-709(e).

XII. REMEDIES

A. *Prior to Award*; If prior to award it is determined that a solicitation or proposed award of a contract is in violation of the law, then the *solicitation* or proposed award shall be:

- (1) Cancelled; or
- (2) Revised to comply with the law.

HRS §103D-706; HAR §3-126-37.

Cases:

Solicitation defined; Courts elect to apply a broad definition to the term “solicitation” so as to incorporate the process of soliciting bids rather than restricting its definition to the actual document soliciting proposals. *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998).*

Remedies; authority of Hearings Officer; “revise” includes remand/reconsideration; The term “revise” in the context of HRS §103D-706 includes remand and reconsideration. *Arakaki v. State, 87 Haw. 147 (1998).*

Remand for reevaluation appropriate prior to award; Where the determination that the solicitation or award was in violation of the law is made prior to the award of the contract, one of the remedies is to revise the solicitation or award to comply with the law. HRS §103D-706(2). Had the contract not been awarded to Ameritech before the Hearings Officer issued his decision, then remand to the Library for reevaluation of the proposals would have been appropriate under HRS §103D-706(2). Because the contract was already awarded, this remedy was inapplicable and, obviously futile. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431 (1997).*

Application of HRS §103D-706 and HRS §103D-707 is contingent on whether contract has been executed. *In re Carl* made clear that HRS §103D-706 is applicable prior to the execution of a contract by the parties. *Jas. W. Glover, Ltd. v. Board of Water Supply (August 7, 2001).*

B. *After an Award*; If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

- (1) If the person awarded the contract has not acted fraudulently or in bad faith:
 - (a) The contract may be ratified and affirmed, or modified; provided it is determined that doing so is in the best interest of the State; or
 - (b) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses, *other than attorneys fees*, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination.

HRS §103D-707(1)(B); HAR §3-126-38.

Cases:

Termination of contract renders ratification determination moot; Hearings Officer was not required to consider interest of State in accepting parties' termination of contract, and Hearings Officer properly found that contracting agency's termination of contract rendered moot the determination of whether contract should be terminated or ratified. *Carl Corp. v. State*, 93 Haw. 155 (2000).

Award limits remedies; The award of a public contract before it has been determined whether the solicitation or proposed award is in violation of the law effectively limits the relief available to the person aggrieved by the solicitation or award. *Carl Corp. v. State*, 93 Haw. 155 (2000).

No authority to dictate method or manner of termination. Nothing in HRS §103D-707 authorizes the Department of Commerce and Consumer Affairs Hearings Officer to dictate the method or manner of contract termination. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997).

Remand inappropriate after award; Nothing in the Code or its implementing regulations gives the Hearings Officer authority to remand to the Library for reevaluation of the proposals. Presumably because of the obvious need for expeditious review of the public contracting decisions, the Code simply does not authorize the Hearings Officer to remand to the contracting agency under these circumstances. Instead, the Hearings Officer's written decisions are to be final and conclusive and any request for judicial review must be filed within ten days of such written decision. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997).

Termination of contract appropriate; Where bidder had been notified of its being awarded the project but a notice to proceed had not been issued, and the evidence did not establish that there was not time to resolicit the project, the appropriate remedy would be termination of the contract and the bidder being compensated for actual expenses, if any, that were reasonably incurred under the contract and reasonable profit based upon any performance on the contract up to the time of termination. *Okada Trucking Company, Ltd. v. Board of Water Supply, et. al*, PCH 99-11 (November 11, 1999) (rev'd on other grounds).

Factors in determining best interest of state; When, after finding and concluding that an agency had violated a provision(s) of the Code, the Hearings Officer must determine whether the remedy of contract ratification (as opposed to termination) would be in the best interest of the State – and in doing so must consider not only the evaluative factors in HAR §3-126-38(a)(4) but also such underlying purposes for the Code. *Environmental Recycling v. County of Hawaii*, PCH 98-1 (July 2, 1998) citing *Carl Corp. v. State*, 85 Haw. 431(1997); *Carl Corp. v. State*, 95 Haw. 155 (2000).

Best interest of state; determination not necessary after bid rejected as nonresponsive; DOE, having correctly rejected bid as nonresponsive, was not obligated to determine that rejection was in its best interest. *Southern Food Group, L.P. v. Dept. of Educ., et. al*, 89 Haw. 443 (1999).

Ratification of illegally awarded contract not in State's best interest; Ratification of an illegally awarded contract can only undermine the public's confidence in the integrity of the system and, in the long run, discourage competition. Any concerns Respondent may have had in avoiding the additional expenses and inconvenience that may result in having to engage in a second solicitation must give way to the State's interest in promoting and achieving the purposes of the Code. As such, ratification of the KTW contract would not be in the best interest of the State. *Environmental Recycling v. County of Hawaii*, PCH 98-1 (July 2, 1998).

Protestor not entitled to award of balance of contract; There is no authority to support an award of the balance of the contract to the protestor. *Environmental Recycling v. County of Hawaii*, PCH 98-1 (July 2, 1998).

Bid preparation costs; elements; Where the contract has been awarded before the resolution of a protest, HRS §103D-701(g) entitles the protestor to recover its bid preparation costs provided (1) the protest is sustained; (2) the protestor should have been awarded the contract; and (3) the protestor is not awarded the contract. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 41 (1997); *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

Bid preparation costs; bad faith; Requiring a determination that the protestor should have been awarded the contract, where the evaluation was so fundamentally flawed that the results are invalid and the required determination cannot be made, unfairly punishes the successful protestor. Thus, where the evaluation is so fundamentally flawed that the determination of who should have been awarded the contract was not, and cannot be, made, and the contract has already been awarded in bad faith and in violation of HRS §103D-701(f), a successful protestor who was not awarded the contract is entitled to recover its bid preparation costs pursuant to HRS §103D-701(g). *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997).

Attorney's fees awarded; Where corporation was deprived of any meaningful relief under the procurement code by the award of the contract to a competing company in bad faith violation of the Code, corporation was entitled to recover its attorneys' fees incurred in successfully challenging the award of the contract before the Hearings Officer and on appeal. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997).

Attorney's fees; elements. Protestor is entitled to recover its attorney's fees incurred in prosecuting its protest if (1) the protestor has proven that the solicitation was in violation of the Code; (2) the contract was awarded in violation of HRS §103D-701(f); and (3) the award of the contract was in bad faith. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997); *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

Bad faith; standard; A finding of bad faith must be supported by specific findings showing reckless disregard of clearly applicable laws and rules. HAR §3-126-36(c). *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997); *Environmental Recycling v. County of Hawaii*, PCH 98-1 (July 2, 1998); *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

Head of purchasing agency chargeable with knowledge of regulations; By virtue as head of a purchasing agency with authority to enter contracts, Kane is certainly chargeable with knowledge of the regulations applicable to public procurement. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997).

"Contract award" defined; There are generally multiple events (or stages) that make up the "contract award" process, and thus a determination of whether HRS §103D-706 pre-award or HRS §103D-707 post-award remedies should be applied under the circumstances in a particular matter may require focusing on the execution of a contract as the critical factor in the overall process in order to fashion appropriate relief. *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation*, PCH 98-2 (May 19, 1998).

Application of HRS §103D-706 and HRS §103D-707 is contingent on whether contract has been executed. *In re Carl* made clear that HRS §103D-706 is applicable prior to the execution of a contract by the parties. *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

Pre-award remedies appropriate up to execution of contract; If the award of a contract were to be construed as a process, with the operative event being the execution of a contract, a more liberal construction could allow for an order remanding the matter to the Respondent for reconsideration of the two areas in which Murphy's bid cannot currently be said to be responsive. *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation*, PCH 98-2 (May 19, 1998).

Cancellation of contract not in public's best interest; To order cancellation of BWS's contract with Okada and order BWS to award a new contract to Inter Island to complete the remaining work for the Project would not be in the best interest of BWS and the public. Not only would the Project be delayed while Okada closed and Inter Island mobilized operations at the Project site, but the Project would be completed on a piecemeal basis, leading to accountability questions in the event problems ensued after the Project was completed. Moreover, Inter Island has already been awarded compensation "for actual expenses, if any, that were reasonably incurred under the contract and reasonable profit based upon any performance on the contract up to the time of termination." *Okada Trucking Co. v. Board of Water Supply, et. al*, 97 Hawaii 544 (App. 2001).

Violation of Stay; Basis for sanctions; Under the Code as presently written, a violation of the stay does not present an independent basis for the imposition of sanctions. Where the agency violates the stay but the protestor is unable to prove that (1) the solicitation itself was in violation of the code or that (2) the agency's actions in awarding the contract amounted to bad faith, the Hearings Officer is powerless to impose sanctions for the violation or award attorney's fees. *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

Violation of Stay; harmless; The stay provisions of HRS §103D-701(f) provide no relief to the protestor because the award or contract issued was not "in violation of law" under HRS §103D-707. There was no evidence that BWS acted in bad faith or committed fraud or that the protestor suffered any prejudice. BWS's violation of the stay was therefore harmless. *GMP Associates, Inc. v. Board of Water Supply; Nos. 24771 & 25193 (Hawaii Supreme Court opinion) (Summary Disposition Order)(September 16, 2003)(not for publication)*.

(2) If the person awarded the contract has acted fraudulently or in bad faith:

- (a) The contract may be declared null and void; or
- (b) The contract may be ratified and affirmed, or modified, if the action is in the best interest of the State, without prejudice to the State's rights to such damages as may be appropriate.

Cases:

Bad faith; standard; A finding of bad faith must be supported by specific findings showing reckless disregard of clearly applicable laws and rules. HAR §3-126-36(c). *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997); *Environmental Recycling v. County of Hawaii*, PCH 98-1 (July 2, 1998); *Jas. W. Glover, Ltd. v. Board of Water Supply* (August 7, 2001).

C. Exclusivity of Remedies; These remedies shall be the exclusive means available for person aggrieved in connection with the solicitation or award of a contract. HRS §103D-704.

XIII. APPEAL

A. *Standing*; Only parties to the proceeding for administrative review who are aggrieved by a final decision of a Hearings Officer may apply for review of that decision. *HRS §103D-710(a)*.

B. *Judicial Review*; Prior to June 19, 2001, original jurisdiction to review the final decisions of the Hearings Officer was vested in the supreme court. On June 19, 2001, HRS § 103D-710(a) was amended to transfer to the circuit courts original jurisdiction to review the Hearings Officer's final decision. *HRS §103D-710(a)*

C. *Time to appeal*; Requests for judicial review shall be filed in the circuit court of the circuit where the case or controversy arises within ten (10) calendar days after the issuance of a written decision by the Hearings Officer. *HRS §103D-712(b)*.

Cases:

Time to appeal; extend time; In considering the procedural timeliness of a party's motion to extend time nunc pro tunc for filing a notice of appeal from a final order, the appropriate guideline for DCCA Hearings Officers in HRS Chapter 103D procurement matters is HRAP Rule 4(a)(5) which, in addition to requiring a showing of "excusable neglect or good cause," sets out mandatory deadlines for the filing of such motions. *Niu Construction v. County of Kauai, PCH 96-1 (April 11, 1996)*.

D. *No Stay*; An application for judicial review shall not operate as a stay of the decision. *HRS §103D-710(b)*.

E. *Transmission of Record*; Within twenty (20) calendar days of the filing of an application for judicial review in the circuit court, the Hearings Officer shall transmit the record of the administrative proceedings to the circuit court. *HRS §103D-710(c)*.

F. *Authority of the Court*; Upon review of the record, the court may affirm the decision of the Hearings Officer or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if substantial rights may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the chief procurement officer or head of a purchasing agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Cases:

No written decision to review; disqualification from bidding on subsequent contracts; Successful bidder to contract terminated by contracting agency could not be disqualified by supreme court from bidding in agency's subsequent Request for Proposals, since there was no "written decision" under HRS § 103D-709, on subject of bidder's debarment, which court could review under HRS §§103D-710(a) and 103D-712(b). *Carl Corp. v. State*, 93 Haw. 155 (2000).

Standard of review; Reviewing court will reverse a Hearings Officer's finding of fact if it concludes that the finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; on the other hand, Hearings Officer's conclusions of law are freely reviewable. *Carl Corp. v. State*, 93 Haw. 155 (2000); *Okada Trucking Co. v. Board of Water Supply, et. al*, 97 Hawaii 544 (App. 2001).

Presumption of validity afforded to agency decision; In order to preserve the function of administrative agencies in discharging their delegated duties and the function of this court in reviewing agency determinations, a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. *Southern Food Group, L.P. v. Dept. of Educ., et. al*, 89 Haw. 443 (1999).

Court should not substitute its own judgment for that of the agency; Insofar as an administrative Hearings Officer possesses expertise and experience in his or her particular field, the appellate court should not substitute its own judgment for that of the agency either with respect to questions of fact or mixed questions of fact and law. *Okada Trucking Co. Ltd. v. Board of Water Supply, et al.*, 97 Hawaii 450 (2002).

G. Costs of Appeal; Subsection (g) does not authorize award of costs associated with an appeal. *Carl Corp. v. State*, 93 Haw. 155 (2000).